

IN THE
Supreme Court of the United States

OCTOBER TERM, 1918

No. _____

THE DES MOINES UNION RAILWAY
COMPANY, FREDERICK M. HUBBELL,
FREDERICK C. HUBBELL AND
F. M. HUBBELL & SON,

Petitioners.

vs.

THE CHICAGO, MILWAUKEE & ST.
PAUL RAILWAY COMPANY AND THE
WABASH RAILROAD COMPANY,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI

The Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son, respectfully petition this Court to grant a writ of certiorari to the Circuit Court of Appeals for the Eighth Judicial Circuit, to remove therefrom, for review here, the record in the case

therein pending, numbered 4885, wherein the petitioners are appellees and the respondents are appellants.

Two controversies are involved in the case, one of which was decided in favor of petitioners and the other against them and in favor of the respondents hereto.

The two controversies are fully presented by the same record and certified copies of that record accompany the petition for certiorari filed by the respondents hereto. And while the two controversies are more or less distinct, they rest upon the same evidence and grow out of the same series of transactions.

The questions to be determined are of the same general nature, involving the construction of contracts and of articles of incorporation as fixed by their terms and the conduct of the parties under them.

Your petitioners believe that if the case is one appropriate for review on writ of certiorari as to one of the controversies therein, it should in justice to all the parties be brought before the Court in its entirety, and being advised that they cannot otherwise have a review of the decision and decree herein, in so far as adverse to them, they respectfully submit this cross-petition for a writ of certiorari.

What is dealt with and designated by the parties and by the Court of Appeals as the "main" controversy or question in the case is presented by the petition of the respondents hereto. The question presented by these petitioners is designated by the parties and the Court as that of the "surplus earnings."

The "main" question is as to the rights of the Chicago, Milwaukee & St. Paul Railway Company and the Wabash Railroad Company, hereinafter called the

Railway Companies, and the Des Moines Union Railway Company, hereinafter called the Terminal Company, in and to the property to which the Terminal Company holds title and which it uses in the course of its operations as a Terminal Company.

The contention of the Railway Companies is that they are the real and beneficial owners of the property, and that the Terminal Company simply holds the title in trust for them, or that the ownership of the Terminal Company is subject to an easement in favor of the Railway Companies which gives them the right to the use of the property in perpetuity for terminal purposes at actual cost of operation, maintenance and taxes, they getting the benefit in reduction of the cost of operation of all revenue from whatever source obtained, thus depriving the Terminal Company of all beneficial interest in the property, and making its shares of stock worthless to the owners of them.

The issued capital stock of the Terminal Company amounts to four hundred thousand dollars divided into four thousand shares of the par value of one hundred dollars each, of which the Wabash Company owns and holds five hundred shares, the Chicago, Milwaukee and St. Paul Company, one thousand shares, and F. M. Hubbell & Son, twenty-five hundred shares. F. M. Hubbell & Son bought their shares from the predecessors in right and title of the Railway Companies.

The real purpose of this branch of the case, and the effect of the contention of the Railway Companies, if sustained, is to nullify and render worthless the shares of F. M. Hubbell & Son.

The determination of this "main" controversy, the Court of Appeals said, was "the definition of the legal

effect of certain instruments and acts of the parties or their predecessors in interest."

This question was decided by the Circuit Court of Appeals in favor of these petitioners, the Court holding that the Terminal Company was the absolute owner of its property, and that the rights of the Railway Companies therein or thereto were simply those of share holders in the Terminal Company.

The Surplus Earnings

controversy is the subject of this petition or cross-petition for certiorari and we may say as the Court of Appeals said of the main "controversy," that the determination of it is "the definition of the legal effect of certain instruments and acts of the parties or their predecessors in interests," and the same instruments and the same acts of the same parties are involved in the petition and cross-petition. This a statement of the case will show.

In December, 1880, the Des Moines and Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company, to which companies the Chicago, Milwaukee and St. Paul Railway is the successor, and the Des Moines and St. Louis Railway Company to which the Wabash Railroad Company has succeeded, desired to bring their lines to the city of Des Moines, the first two from the North and Northwest and the third from the South.

Among other things done by them was the acquisition of certain real estate in the city of Des Moines, respecting which they made an agreement on January 2nd, 1882, reciting the acquisition of the property and providing that the expense of acquiring and improv-

ing it should be borne one-fourth each by the Northern companies and one-half by the Southern. We can speak of them hereafter, the Northern companies as the Milwaukee and the Southern as the Wabash.

The property had been acquired chiefly in the names of individuals who were confessedly trustees for the railroad companies.

The contract provided:

"Third: * * * It is understood that a depot Company may be organized and may take permanent charge of the property upon the terms herein set forth and that said Company may issue and deliver to the Companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements."

"Fourth: The title to said property shall be and remain in a trustee to be named by agreement by said Companies but subject to the joint use and occupation of all of said Railway Companies upon the terms herein prescribed."

"Tenth: In the event that any Company, whose railroad does not extend to Des Moines, shall effect an arrangement for running its trains into Des Moines over the railroad of either of the parties hereto, such Company shall be entitled to the use of all of said terminal facilities upon the payment of a fair sum for rental and its proportion of the maintenance account, the rental to inure to the companies hereto in the same proportion as the original outlay, and the sum due from such Company for maintenance account to be determined in the same manner as the sums due from the other companies, parties hereto. Railroad Companies whose roads extend to Des Moines, may be admitted to the use of said facilities by agreement of all the parties hereto."

(Record, pp. 120-122.)

The Wabash Company was to have control, supervision and maintenance of the property and the expense of this was to be borne by the several companies on a wheelage basis.

The companies operated under this contract for some years, each doing its own terminal work, that is, employing its own engines and crews and moving its own cars.

This was not a satisfactory method of operation and in December, 1884, the Railway Companies organized the Terminal Company under the laws of the State of Iowa governing corporations for pecuniary profit, to carry out, as they said, the objects and purposes of the contract of January 2nd, 1882.

They provided for a capital stock of one million dollars "which shall be divided into shares of one hundred (\$100.00) dollars each, and shall be paid in at such times and in such manner as the Board of Directors may determine and the Board are authorized to receive in payment therefor the property and franchises in the city of Des Moines now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, trustee, Jas. F. How and Grenville M. Dodge." (Record, pp. 9-11.)

There was no restriction in the articles as to who might become a stockholder in the Company, but the directors were distributed among the Railway Companies, four to the Northern companies and four to the Southern. And no stockholder was eligible to a directorship unless nominated by a Railway Company.

The terminal property held by and for the Rail-

way Companies was in time duly conveyed to the Terminal Company. The consideration for such conveyance was the proportion of each of the Railway Companies of the stock and bonds of the Terminal Company. Bonds to the extent of Eight Hundred Thousand Dollars, secured by mortgage on all the property of the Terminal Company, were authorized and executed November 1st, 1887, and something above four hundred thousand of these were delivered to the parties entitled to them on account of the property then and previously conveyed to the Terminal Company. Other of the bonds were issued from time to time as other property was acquired.

No shares of capital stock were then actually printed or issued, but the parties assumed the existence and outstanding of ten thousand shares of one hundred dollars each, one-fourth as held by each of the Northern Companies and one-half by the Southern Company.

May 1st, 1888, the Terminal Company took actual possession of its property and has ever since operated the same.

The delay in the proceedings was due undoubtedly to the fact that the railway enterprises were not prosperous, the Record showing a foreclosure of mortgages in every case except that of the Terminal Company.

May 10th, 1889, the contract was made between the Terminal Company and the Railway Companies, which underlies the contention as to "surplus earnings." It was to be effective from May 1st, 1888, and to run for a period of thirty years from that date. (Record, pp. 150-159.)

When this contract was executed, the capital stock

of the Terminal Company was owned, one-fourth by each of the predecessors of the Milwaukee Company and one-half by the predecessor of the Wabash.

The contract recited that the Terminal Company was the owner of valuable terminal facilities in the city of Des Moines and that it was important that the Railway Companies should have use of them. Also that the Terminal Company should from time to time acquire other and further facilities, among them a union passenger depot, freight depots, etc., etc., the amount, character, cost and management of these to be determined by the Board of Directors of the Terminal Company.

Section three of the contract provided:

"Each of said parties of the second part (Railway Company) for itself and its assigns, agrees to pay to said party of the first part (Terminal Company) a sum of money to be ascertained as follows, to-wit:

1st. There shall be ascertained the amount required to pay five per cent interest upon the mortgage bonds of the party of the first part, one-twelfth of which, less any deduction hereinafter provided for, shall be payable monthly as hereinafter specified.

2nd. At the expiration of each month, or as soon thereafter as practicable, there shall be ascertained the expenses of maintaining and repairing the property of the party of the first part, including the maintenance and repair of tracks, depots, round houses, engine houses, etc., during the preceding month. And in like manner there shall be ascertained the taxes, general or special, levied upon or against said property and paid

during the preceding month, or to be paid during the next succeeding month, and the insurance, if any, paid during the preceding month, or to be paid during the next succeeding month.

3rd. There shall be likewise ascertained the costs and expenses of every nature connected with the operation of said terminal station, freight and passenger depots, depot grounds, round houses, transfers and other properties, which is to include every item of expense or disbursement incurred or made by the party of the first part not herein-before mentioned, except the expenses specified in Section Nine hereof."

Section nine makes special provision as to the operation of engine houses, which need not be further considered.

Section four is as follows:

Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, *there shall be deducted therefrom the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof,* for the preceding month, and the remainder shall be paid by the parties of the second part in the proportion that the wheelage of each of said parties bears to the entire wheelage of all said second parties during such preceding month, and it is expressly understood and agreed that in computing wheelage, three narrow gauge cars shall be taken as the equivalent of two standard gauge cars, and that the term "wheelage" as used in this contract means that three narrow gauge cars are to be accepted as the equivalent of two standard gauge cars.

Provisions of the contract for the enforcement of payment need not be considered.

The contract recites the shareholding in the Terminal Company by the Railway Companies as above set forth, and further the authorized capital stock having been increased to two million of dollars "that as the authorized capital stock of said company is two million dollars, or twenty thousand shares of one hundred dollars each, the same shall be issued and held as follows, to-wit: One certificate of ten thousand shares shall be issued and delivered to the Des Moines & St. Louis Railroad Company; one certificate for five thousand shares shall be issued and delivered to the St. Louis, Des Moines & Northern Railway Company, and one certificate for five thousand shares shall be issued and delivered to the Des Moines & Northwestern Railway Company, and all of said certificates shall express upon their face that they are not transferable in whole or in part, without the consent in writing of all the parties of the second part to this agreement, except that any shares of stock issued on request of either of said companies to any person, to qualify him as a member of the Board of Directors shall be re-transferable to the company on whose request it shall have been issued without the consent of the other companies; but certificates of stock so issued shall express upon their face that they are only transferable to the company on whose request they were issued, unless consented to by the other parties of the second part.

The bonds of the Terminal Company were negotiable and were in fact sold on the open market.

The Railway Companies were interested in the Terminal Companies in two ways, first as shareholders

and second as entitled to service by the Terminal Company in accordance with the terms of the contract.

Neither of these interests was an equal one as between the companies. As shareholders, two of them had one-fourth each, and the other had one-half. So far as the service was concerned each was to pay for such service as it received, that is on a wheelage basis.

As shareholders each, if the company made any net earnings out of its property, was entitled to the proportion indicated by its holding of capital stock. As to service it paid for what it got on the terms to which it had agreed.

The charge for the service was to be ascertained as to all the companies by ascertaining certain costs and expenses, deducting therefrom certain items of credit and then dividing the remainder between the Railway Companies on a wheelage basis.

There is no controversy here as to the wheelage basis, nor as to the items of charge, which are: (1) interest on bonds, (2) maintenance and repair, (3) taxes, (4) insurance, and (5) costs and expenses of every nature connected with operation.

From the sum of these items of charge there is to be a deduction and it is as to this that the controversy arises.

The contract provides that the aggregate of the items of charge having been ascertained "there shall be deducted therefrom *the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property or parts thereof.*"

The Terminal Company has such contracts and the amounts received under them have always been deducted from the ascertained items of charge against the Railway Companies.

And the Terminal Company has other sources of revenue. From time to time it moves cars from and to industries located on its lines to carriers other than the Railway Companies and other than those with which it has contracts, and for this it makes and collects a charge.

It leases portions of its depot building for news and cigar stands and for restaurant purposes. And it has acquired property in advance of its immediate use for terminal purposes and lets this for various purposes. The returns from this switching service and these rentals are known as "surplus earnings." At the time of the trial in the District Court these earnings aggregated about a half million dollars and they have accumulated since at the rate of about a hundred thousand dollars a year.

The Railway Companies contend that these surplus earnings should be deducted from the monthly aggregate of the items of charge against them under the contract of May 10th, 1889. The petitioners contend that, inasmuch as none of the moneys from which the "surplus earnings" are derived are "amounts to which *other railway companies* may be under obligation to pay by *virtue of contracts* for the use of said property," they should not be so deducted.

The Circuit Court of Appeals decided this adversely to these petitioners, saying of the contention of the petitioners that

"*this latter contention is a strict construction of the exact wording of the contract.* It is not in our judgment a fair construction of the spirit of the agreement. This conclusion is based both upon the history of the transaction and upon the meaning to be given to this precise language when read in connection with the entire contract."

The provision of the contract here in question, that is, section four, is clear and unambiguous in itself, providing for deduction from the aggregate of charge, the moneys received on a single account, being the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property.

To deduct the rentals of news and cigar stands and payments for restaurant privileges is to add to the deduction provided for in the contract deductions of a very different kind, and is to write something into the contract which the parties did not write there.

"The meaning to be given this precise language when read in connection with the entire contract," is the same as when considered by itself, for this section is the only one in the entire contract dealing with this subject in any way. No other clause alludes to it even remotely and so cannot in any way qualify it.

Nor is the spirit of the agreement in any wise offended, and on the contrary, the "strict construction of the exact wording of the contract" is "a fair construction of the spirit of the agreement."

The contract is one for services by the Terminal Company, involving the use of its property, to be rendered to the Railway Companies. It did not involve the use of properties not used for terminal railway purposes. It had nothing to do with news stands or restaurants.

The Railway Companies were shareholders in the Terminal Company. Indirectly they were proprietors, and in such proportion as they had deliberately determined a number of times by agreement with each other. If there were any profits resulting from any use of this property other than that provided for by this contract

each company had its share in those profits in the measure of its indirect share of the property itself.

These "surplus earnings" were incidents of the proprietorship of the Terminal property and not incidents of the service contract between the Railway Companies and the Terminal Company.

"The history of the transaction" leads to the same conclusion. There were no individual shareholders in the Terminal Company until some time in 1890, when F. M. Hubbell and General G. M. Dodge acquired shares. Until now it was a matter of small significance what was done with the surplus earnings, for two reasons, i. e., they were small in amount and they went to the benefit of the Railway Companies in any event, and whether on a wheelage or a stock basis made no practical difference.

On February 11th, 1891, was had the first action respecting them. On that day it was ordered by the Board of Directors of the Terminal Company:

"That the rents collected for the use of the Company's real estate, and the switching charges paid in, be credited on the rolls of the different tenant companies occupying this Company's terminals, giving to each Company its share ascertained by wheelage." (Record, p. 497.)

This was a disposition of these earnings by the Terminal Company and the authority of the Terminal Company therefor was regarded as necessary. The earnings were earnings of the use of the property and not earnings of the service rendered by the Terminal Company to the Railway Companies. So they belonged to the owner of the property, and consequently the owner of the property determined the disposition of them.

On the 7th day of January, 1892, the holdings of F. M. Hubbell had increased to one thousand shares and G. M. Dodge still held five hundred, and the Board of Directors of the Terminal Company again exercised the right of dispensing of these earnings by the following resolution, viz.:

"Whereas, this Company is in need of a cash capital with which to purchase supplies and pay current bills which come in before it receives its monthly revenue from the tenant companies.

Therefore, Be It Resolved: That until the further action of the Board the sums received as rents of real estate and all switching charges shall not be credited upon the accounts of the tenant companies, but shall be used for the aforesaid purposes."¹¹ (Record, p. 499.)

And from this time on without question these earnings were dealt with by the Terminal Company as its own, and growing yearly in amount they were used in the acquisition of more property and in the making of improvements and extensions or accumulated as a surplus in the treasury until after January, 1906, a period of fourteen years, and but a short time prior to the beginning of this litigation.

Meanwhile the shareholding interests in the Terminal Company had greatly changed.

In April, 1890, the articles of incorporation of the Terminal Company were materially amended. At the meeting of the shareholders making these amendments on motion of A. B. Cummins, there was a valuation of the property of the Terminal Company in order to fix its fair worth in bonds and stocks, he being evidently of opinion that \$2,000,000 of stock with the bonds that had been issued constituted a material over-valuation. The fair value was fixed at \$861,257 and 21/100, the

individual interests in which were settled as follows,
viz.:

The Wabash	\$470,110.80
The Des Moines & N. W.	215,058.40
The St. L., Des Moines & N.	100,000.00
G. M. Dodge	74,088.01
Polk & Hubbell	2,000.00
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	\$861,257.21

On this account bonds had been issued as follows:

The Wabash	\$270,000.00
G. M. Dodge	74,000.00
Polk & Hubbell	2,000.00
Des Moines & N. W.	115,000.00
	<hr/>
	\$461,000.00

This left aside from \$257.21 settled in cash, \$400,000, which went in shares of the Terminal Company to the parties entitled, \$200,000 to the Wabash and \$100,000 to each of the two Northern Companies.

But with this adjustment of the Terminal stock in view the Wabash Company had a short time before sold one-eighth of its allotment to F. M. Hubbell and the same amount to G. M. Dodge and a month or more later sold 500 more shares to F. M. Hubbell, so that on June 5th, 1890, the stockholding stood:

The Wabash	500	shares
Milwaukee predecessors	2,000	"
F. M. Hubbell	1,000	"
G. M. Dodge	500	"

January 15th, 1892, Dodge and Hubbell transferred their shares to a consolidated company which was the

immediate predecessor of the Milwaukee, giving it 3,500 shares and leaving the Wabash with five hundred.

October 4th, 1893, the consolidated company pledged 2,500 of its shares to F. M. Hubbell & Son as collateral for indebtedness and January 29th, 1894, sold the stock so pledged in liquidation of debt to F. M. Hubbell & Son.

Ever since January 29th, 1894, the stock of the Terminal Company has been owned:

The Wabash	500	shares
The Milwaukee, or predecessor	1,000	"
F. M. Hubbell & Son	2,500	"

It so appeared on the record and the Wabash Company was well aware of it all of the time. It had sold 1,500 of its own shares and knew where they had gone.

The Milwaukee Company became interested in the Northern railways in 1894 and acquired a majority of their capital stock in large part by gift from F. M. Hubbell & Son and in lesser part by purchase. The Milwaukee Company was advised that the consolidated Company owner of the two Northern railways, owned also 1,000 shares of the Terminal Company and no more, that the Wabash owned 500 and that private parties owned 2,500, or a majority.

With this knowledge the Milwaukee acquiesced in the disposition made of the surplus earnings for more than twelve years, after it acquired its interest in the Terminal Company.

The Circuit Court of Appeals in its opinion said and held that "a subsequent contract of July 31st, 1897, does not affect this controversy."

In this we think the Court erred, for the contract of July 31st, 1897, was a reaffirmation in terms of the

contract of May 10th, 1889. From the beginning to the time the new contract was made the "surplus earnings" had been disposed of as determined by the Directors of the Terminal Company and ever since January 7th, 1892, they had so far as disposed of, been appropriated to the uses of the Terminal Company for the acquisition of additional property. And this disposition of the earnings was deliberately approved by Mr. Hays, the Wabash representative on the Board. June 7th, 1894, Mr. Hays wanted time to consider the appropriation made to discharge a mortgage debt on some newly acquired property. June 19th, 1894, he gave his consent. In August of that year and again in November he approved of other like dispositions of these monies. At the November meeting of the Terminal Board, Mr. Cummins representing Mr. Hays, a resolution was passed directing that a certain mortgage debt be paid out of the "surplus earnings" and providing in terms that

"The term 'surplus earnings' as herein used means that fund arising from the rentals of real estate and from switching charges." (Record, p. 1344.)

Why such a resolution? If every penny received by the Terminal Company from any and all sources must be deducted from the aggregate of the charges against the tenant companies, there would be and could be no "surplus earnings." The very use of the term was an acknowledgment that the parties recognized the meaning of the contract to be expressed by what the Court of Appeals spoke of as its exact wording.

December 28th, 1896, Mr. Ashley, President of the Wabash, wanted a new contract with the Terminal

Company, because of a foreclosure of mortgage against one of the tenant companies, which had weakened the position of the Terminal bonds on the market.

When it came to drafting the new contract, changes were desired and proposed by the Wabash as to the surplus earnings, and they were spoken of as changes.

Mr. F. C. Hubbell for the Terminal wrote to Mr. Ramsey of the Wabash, as follows:

"Referring to the new terminal contract, I have seen the correspondence between you, Mr. Blodgett and Mr. Cummins. With respect to the Des Moines Union's revenue from rental and switching, would say that this fund has always been controlled by the Terminal Company, and is the only money which it has to use for other than strictly operating expenses. We therefore feel that the new contract should leave this fund the property of the Terminal Company. The rental and switching is a small item, and is now being used to pay our floating debt, consisting of \$31,000 held by Commercial Bank of St. Louis, which will consume this fund for a good many years." (Record, p. 1680.)

On the same day, February 18th, 1897, Mr. Cummins wrote to Col. Blodgett, General Counsel of the Wabash, as follows:

"Have your favor of the 16th inst., and have carefully considered the amendments that you propose to the terminal contract, and the reasons which are stated in Mr. Ramsey's letter for the changes." (Record, p. 1684.)

* * * * *

"With respect to the change in Sec. 4, which would require the Des Moines Co. to credit upon its expenses and disbursements the accounts re-

ceived by it for switching charges, rental of houses and things of that character, Mr. Hubbell has written to Mr. Ramsey recalling to his attention the situation, which absolutely precludes the disposal of such revenues of the company in that way." (Record, p. 1686.)

February 24th, 1897, Mr. Cummins wrote to Mr. Hubbell, saying, "I have a telegram from Col. Blodgett asking me to send a copy of the *amended articles* of the company," etc.

March 26th, 1897, Col. Blodgett wrote to F. M. Hubbell, enclosing proposed amendments to the contract which he speaks of as changes. The second change is as follows:

"2nd. I send Section 3 in two forms, and I need not go into any detailed explanation of them. Number one is founded upon the theory that the Des Moines Company may do a switching business during the whole period of the lease, paying, on a wheelage basis, the same proportion of interest charges, cost of maintenance and operating expenses, as is paid by the tenants, and using its net revenue throughout the term in improving the property. That is the form suggested by Mr. Ramsey and myself.

Number two presents the section as you and Mr. Ashley suggested. Under it you are to switch and handle cars for others than tenant companies, and collect the revenue, until the net profits, together with the rentals from portions of the ground, amount to fifty thousand dollars, of which sum thirty-five thousand dollars is to be applied on the floating debt, and the balance used for a working fund. And after the fifty thousand dollars has been realized, all the net revenues from switching is to go to the tenant companies to re-

duee their expenses, on a wheelage basis." (Record, p. 1687.)

Different changes were proposed by different parties, but not accepted, and the matter was closed by a ratification agreement of date July 31st, 1897.

At this time all the original parties to the contract of 1889 except the Terminal Company had gone out of business because of insolvency and new companies owned and operated their lines of railroad, one company having now acquired both Northern lines. The new contract recited this history and further that "it has been doubted whether the said contract is legally binding upon the said Wabash Company and the said Des Moines Northern and Western Company." It was provided as follows:

"Now, therefore, in consideration of the premises and for the purpose of removing all doubt with respect to the said subject, it is now agreed by and between the parties hereinbefore named that the said contract, a copy of which is attached, shall be and become binding and obligatory upon said Wabash Company and the Des Moines, Northern & Western Company.

And the said Wabash Company for itself agrees to make the payments therein provided for at the times and in the manner prescribed for the said Des Moines & St. Louis Railroad Company so long as it operates the railroad of the said Des Moines & St. Louis Company, and when the said Wabash Company ceases to operate the railroad of the said Des Moines & St. Louis Company its obligation to so pay, and all the obligations herein assumed by it, shall at once determine and be and become the obligations of whatever company operates the said railroad, it being the intention that the obligations of the said contract, so far as they pertain

to the Des Moines & St. Louis Railroad Company, shall attach to and become the obligations of the successor of the said Wabash Company in the operation of the said Des Moines & St. Louis Railroad, and any company succeeding the Wabash Company in such operation shall be held by the operation of trains over the said Des Moines & St. Louis Railroad, and upon the property leased in the said contract, to assume all the obligations therein or hereby undertaken by either the said Des Moines & St. Louis Company or the said Wabash Company.

And the said Des Moines, Northern & Western Company for itself agrees to assume all the obligations of a lessee railroad company as prescribed in the said contract for the entire term named therein, and as though it had been named in and was a party to the said contract when originally made, *and to pay to the said Des Moines Company at the times and in the manner therein prescribed, the sums of money which may become due, computed according to the terms and provisions of the said contract with respect to a tenant company;* and the said Des Moines, Northern & Western Company further agrees that the obligations therein named and hereby assumed shall pass with the railroad it now owns and operates, and shall become the obligations of any assignee, grantee, or successor of the said Des Moines, Northern & Western Company in the ownership or operation of the said Des Moines, Northern & Western Railroad, and any company succeeding the Des Moines, Northern & Western Company, in such ownership or operation shall be held by the operation of trains over the said Des Moines, Northern & Western Railroad, and upon the property leased in the said contract, to assume all the obligations therein expressed and herein undertaken by said Des Moines, Northern & Western Company.

But it is expressly provided that so much of the said contract, a copy of which is hereto attached, as relates to the issuance and the distribution of the capital stock of the said Des Moines Company, is no longer binding, and that the capital stock of the said Des Moines Company is held as follows:

The purchasing committee of the Wabash, St. Louis & Pacific Railway Company, 500 shares.

The Des Moines, Northern & Western Railroad Company, 1,000 shares.

F. M. Hubbell & Son, 2,500 shares." (Record, p. 506.)

Here is not only a ratification or adoption of the contract by the Wabash Company and the company to which the Milwaukee is successor, but a reiterated agreement to pay to the Terminal Company at the time and in the manner prescribed in the contract the sums of money "which may become due *computed according to the terms and provisions of said contract with respect to a tenant company.*"

And added to this is the very express recognition of the fact that there is a large, a majority interest in the shares of the Terminal Company which is independently and individually held and is interested in the construction of the contract according to its express terms.

And from this time until 1906 the contract was construed according to its terms, surplus earnings being used from time to time for the acquisition of additional property, without protest from any one and with the approval of all concerned.

In view of all the facts, preceding, attending and following the execution of the contract of July 31st, 1897,

there was manifest error in holding that it "does not affect this controversy."

The history of this transaction has in considerable part been given, but there is much more in the record of the same nature, and much of that related to the main controversy which bears directly and indirectly upon the question of surplus earnings. The Hubbells, father and son, gave liberally and freely, the son for many years entirely, their time and service to this enterprise. They fostered it during all the thirty years of the contract of 1889, which certainly they would not have done if this contract had been a barren one and their stockholdings barren also. True, for a time they were interested in the Northern railroads, but from the time the Milwaukee acquired its holdings in these they had, if the contention of the respondents now made is warranted, no interest whatever in the Terminal Company, except the holding of stock which was forever precluded from yielding any profit. Still they conducted its business, managed and directed its affairs for years and were permitted to do this by respondents without the pay of a dollar, conduct upon both sides inconsistent with any view other than that they had a substantial beneficial interest as large stockholders in the Terminal Company.

We submit that the Circuit Court of Appeals erred in holding:

I. That the contention of petitioners that the only character of credit items to which the respondents were entitled under the contract "were such as were paid by some other railway by virtue of a contract for the use of the property" while "a strict construction of the exact wording of the contract" is not "a fair construction of the spirit of the agreement."

II. That its conclusion as to what was the "spirit of the agreement was based upon or warranted by the history of the transaction.

III. That its construction of the contract giving the surplus earnings to the respondents was justified by the reading of the contract in its entirety.

IV. And in its order, judgment and decree directing the District Court of the United States for the Southern District of Iowa to so modify its decree "that the surplus earnings belong to the railways, and to appoint a master under instructions to ascertain the part due each upon a wheelage basis."

The petitioners therefore pray that a writ of certiorari issue to said Circuit Court of Appeals to remove therefrom the Record in this cause for review here by this Court of the questions presented and the errors specified in this petition.

Respectfully submitted,

J. L. PARRISH and
F. W. LEHMANN,
Of Counsel for the Petitioners.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1919

**CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY and WABASH
RAILWAY COMPANY,**

Petitioners,

vs.

**DES MOINES UNION RAILWAY COM-
PANY, F. M. HUBBELL and F. C. HUB-
BELL,**

Respondents.

No. 278

**DES MOINES UNION RAILWAY COM-
PANY, F. M. HUBBELL, F. C. HUBBELL
and F. M. HUBBELL & SON,**

Petitioners,

vs.

**CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY and WABASH
RAILWAY COMPANY,**

Respondents.

No. 279

On Writs of Certiorari to the United States Circuit
Court of Appeals for the Eighth Circuit.

Statement, Brief and Argument for Respondents in No. 278

These cases present two controversies in one and the same suit brought by the petitioners in No. 278 as com-

plainants against the respondents in that case as defendants, in the District Court of the Southern District of Iowa, Central Division.

One controversy concerns what has been called the Main Issue, which is as to the ownership of certain terminal property at Des Moines, and the other is as to what are called Surplus Earnings, arising under a contract of 1889 for the operation of the terminal properties.

The District Court decided the main issue in favor of the defendants, with a qualification as to which the defendants appealed, and decided the surplus earnings question unqualifiedly in their favor.

The Circuit Court of Appeals decided the main issue unqualifiedly in favor of the defendants and that decision was brought here for review by the petitioners in No. 278. The question of surplus earnings was decided adversely to the defendants and that decision is the subject of review in No. 279.

We shall deal first with the *Main Issue*.

STATEMENT OF FACTS.

Prior to 1881 the Wabash, St. Louis & Pacific Railway Company (hereafter sometimes referred to as the "Wabash Company") was the owner of a line of railroad extending from St. Louis northwesterly to Albia, Iowa. The Des Moines Northwestern Railway Company was the owner of a line of narrow gauge railway extending from Waukeee, Iowa, a town some ten miles west of Des Moines, northwesterly to Panora, in which railway J. S. Clarkson and others were interested.

These railway companies being desirous of extending their lines to Des Moines and interchanging traffic

therein, the Wabash Company on December 8, 1880, entered into a contract with J. S. Clarkson and others (vol. II, p. 396), providing for the organization of the Des Moines & St. Louis Railroad Company and the building of a line from Albia to Des Moines with funds to be furnished by the Wabash Company. On the same day the Wabash Company also entered into a contract with the Des Moines Northwestern Railway (vol. II, p. 400), looking to the extension of that line to Des Moines and also in a northwesterly direction, and also looking to the use by that company of a terminal in the City of Des Moines to be owned by the Des Moines & St. Louis Railroad Company.

In pursuance of these contracts, the Wabash Company, in the early part of 1881, commenced to acquire property in Des Moines for terminal purposes taking the title in James F. How, who was then Vice-President of the Wabash Company, and charging the money so expended to the Des Moines & St. Louis Railroad Company (vol. III, p. 989).

In April, 1881, there was organized under the laws of Iowa a corporation known as the St. Louis, Des Moines & Northern Railway Company, with power to construct a railroad from Des Moines northwesterly to Boone, Iowa, and thence to the northerly part of the state. This company proceeded to construct a narrow gauge line from Des Moines to Boone, with a branch line from Clive (a station about five miles west of Des Moines), to Waukee.

In January, 1882, it entered into a contract (vol. II, p. 600) with the Des Moines Northwestern Company, by which it sold to that company the line from Clive to Waukee, and a one-half interest in the line from Clive

to Des Moines thereby giving the latter company access to Des Moines.

In the meantime there had been changes in the plans of these companies with respect to the terminal in Des Moines which it was originally intended should be owned exclusively by the Des Moines & St. Louis Railroad Company. In April, 1881, the plan was changed from an ownership exclusively by the Des Moines & St. Louis Company to an ownership jointly by the Des Moines & St. Louis and the Des Moines Northwestern Company (vol. III, p. 989), and later this plan was changed to an ownership jointly by the three companies—the Des Moines & St. Louis, the Des Moines Northwestern, and the St. Louis, Des Moines & Northern. This ripened into the contract of January 2, 1882, (vol. II, p. 411), which set out the terms on which the terminal property should be owned and used by the three railroads.

In the meantime additional terminal property was acquired and improvements made thereon with money furnished principally by the Wabash Company, though some of the money was furnished by General Dodge who was the principal owner of the St. Louis, Des Moines & Northern Company. The title to the terminal property was taken principally in the name of James F. How, trustee, though a small amount was taken in the name of General Dodge, a small amount in the name of the Des Moines & St. Louis Company, and a still smaller amount in the St. Louis, Des Moines & Northern Company.

The Des Moines & St. Louis Company having constructed its line into Des Moines these three railroads or their lessees commenced to use and operate the terminal property jointly, as provided in the contract of

January 2, 1882. That contract provided that the terminal property should be owned jointly by the three railways in the proportions therein stated; that the title thereto should stand in the name of a trustee, who might or might not be a depot company; that it should be policed and maintained by the Des Moines & St. Louis Company, and that the expenses of maintenance and operation should be borne by the users on a wheelage basis.

Thus matters continued until December, 1884, when the representatives of the three railorad companies organized, under the laws of the State of Iowa relating to the organization of corporations for pecuniary profit, the defendant, the Des Moines Union Railway Company, with power to acquire, own and operate a terminal railway in the City of Des Moines, and especially authorized to issue its capital stock in purchasing the terminal property then owned by the three railway companies (see articles of incorporation of Des Moines Union Railway Company, vol. II, pp. 416-23).

Immediately upon the organization of the defendant, the Des Moines Union Railway Company, the three railways parties to the contract of January 2, 1882 at meetings of their stockholders passed resolutions authorizing their officers to transfer to the defendant company the ownership of the terminal property (vol. II, pp. 423-32). These resolutions did not authorize How and Dodge, the trustees, to transfer to the defendant company the legal title to the property, but simply authorized the beneficial owners to convey the ownership. The consideration for the transfer of the ownership was stated in the resolutions to be the bonds and stock of the defendant company.

On the same day the Board of Directors of the defendant company passed resolutions accepting the propositions of the three railroad companies (vol. II, p. 432). However, nothing was immediately done under these resolutions owing, no doubt, to the fact that at about this time the Wabash Company (which was the leading spirit behind all these transactions) became insolvent, its property placed in the hands of a receiver and sold to certain persons known in this record as the "Purchasing Committee." These resolutions were, however, never repealed and were finally acted upon.

Nothing further was done in the matter until in the fall of 1887, when these three railroad companies passed resolutions authorizing How and Dodge, trustees, to transfer the legal title to that portion of the terminal property which they held, to the defendant company (vol. II, pp. 435-43); these deeds to be delivered to the defendant company upon its giving to How and Dodge written agreements that it would deliver to the parties entitled thereto bonds of the defendant company equal in amount to the sums advanced by the Wabash Company and General Dodge in payment for the terminal property the improvements thereon, taxes and interest, and also its capital stock.

Following the passage of these resolutions, How and Dodge gave to the defendant company deeds to the property standing in their names; the Des Moines & St. Louis Railroad Company gave the defendant company a special warranty deed not only to that portion of the terminal property standing in its name, but also to all other property, including railways, embankments, buildings, improvements, franchises, etc., in which it had any interest, in the City of Des Moines,

Iowa; and the St. Louis, Des Moines & Northern Company gave to the defendant company a deed, which by its terms transferred an absolute title to that portion of the terminal property standing in its name (vol. II, pp. 446-59). No part of the terminal property stood in the name of the Des Moines Northwestern Company and no deed was given by that company to the defendant, but each of the three railway companies or their successors received the consideration provided for in the resolutions.

On May 1, 1888, the defendant railway company took possession of the terminal property and has ever since possessed and operated it.

Immediately upon the defendant's taking possession of the terminal property, it commenced to furnish terminal service to the three railroad companies or their successors, and negotiations were entered into to determine the terms on which such terminal service should be rendered. These negotiations resulted in the contract of May 10, 1889 (vol. II, p. 479). This contract provided that for a certain consideration the defendant company should furnish to the three railway companies terminal facilities and perform certain terminal services for a period of thirty years from and after May 1, 1888. Ever since the execution of this contract the defendant has furnished to the three railroads and their successors, terminal facilities and services as therein provided.

On April 8, 1890, for the purpose of making the title and ownership of the terminal property by the defendant company more clear and certain, a meeting of the stockholders (among whom were complainants' predecessors) was held, at which the articles of incorpora-

tion of the defendant company were amended and certain resolutions passed (vol. II, pp. 488-97).

During the whole period from May 1, 1888 (the date the defendant took possession of the property), to the commencement of this suit (in 1907), the defendant treated the terminal property as its own. It acquired additional property, made improvements and extensions, made contracts to furnish service to other companies, and made other contracts with complainant companies and their predecessors. Not only during this period did defendant company treat the property as its own, but it was so treated by complainants and their predecessors and all others who had any relation to the properties. The facts in the record sustaining this are so voluminous that it is impracticable to make specific reference to them here, but such reference will be made in our argument on the facts.

THE ISSUANCE AND OWNERSHIP OF THE STOCK IN THE DEFENDANT COMPANY.

Under the contract of January 8, 1882, the ownership of the then terminal property was as follows:

One-half in the Des Moines & St. Louis Company.

One-fourth in the Des Moines Northwestern Company.

One-fourth in the St. Louis, Des Moines & Northern Company.

This contract also contemplated that the parties advancing money to acquire and construct the terminal should receive first mortgage bonds for the money so advanced. The resolutions of the three railways passed January 1, 1885, authorizing a transfer of the

ownership of the terminal property to the defendant company, provided:

“That the proper officers of this Company be authorized upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company to which it may be entitled, under said contract, to convey, assign and transfer,”
etc. (Vol. II, p. 424).

Under these resolutions, presumably the bonds would go to the persons or companies advancing the money (which were the Wabash Company and General Dodge), and the stock distributed between the three railway companies parties to the contract of January 2, 1882, in the proportion heretofore mentioned, viz. ownership of the terminal property.

In the resolutions of November 5, 1887, authorizing a transfer to the defendant company by How and Dodge, trustees, it was provided that the transfer should be made upon the defendant company agreeing to give to the purchasing committee of the Wabash Company first mortgage bonds equal in amount to the money advanced by the Wabash Company in purchasing and improving the terminal property, paying taxes thereon with interest, together with three-fourths of the capital stock of the defendant company, and upon giving to General Dodge bonds equal in amount to the money advanced by him for the same purpose, with interest, and one-fourth of the capital stock of the defendant company.

The reason for authorizing the issuance of three-fourths of the stock to the Purchasing Committee and one-fourth of the stock to General Dodge was that the Purchasing Committee was in equity entitled to the

stock coming to the Des Moines & St. Louis Company as well as to the Des Moines Northwestern Company, while General Dodge represented the St. Louis, Des Moines & Northern Company.

After the transfer of the property to the defendant company, but before possession was taken, the amount of bonds to be issued for the property was ascertained and the issuance thereof was authorized and directed by the defendant company (vol. II, p. 478). No certificates of shares of stock were actually issued until April 8, 1890.

In the meantime, however, the firm of Polk & Hubbell, of Des Moines, had acquired through contracts with the Purchasing Committee the line of road formerly owned by the Des Moines Northwestern Company extending from Des Moines, through Panora, to Fonda, and a one-fourth interest in the terminal property in Des Moines; or in lieu of such one-fourth interest, one-fourth of the stock and bonds issued by the defendant company in payment for the terminal property (Exhibits 263, 264, 265, vol. IV, pp. 1573-6; ex. 60, vol. II, p. 613). This property Polk & Hubbell transferred to the Des Moines & Northwestern Railway Company on May 19, 1888 (vol. II, p. 619). From this time up to about April, 1890, the stock of the defendant company, though not issued, was owned as follows:

One-half by the Purchasing Committee, as representative of the Des Moines & St. Louis Company;

One-fourth by the St. Louis, Des Moines & Northern Company;

One-fourth by the Des Moines & Northwestern Company.

On April 8, 1890, a resolution passed at the meeting of the stockholders of the defendant company authorized the issuance of \$400,000.00 of the capital stock of the defendant company in final payment for the terminal property, the same to be issued to the corporations and in the proportions above named (vol. II, pp. 494-6).

Just prior to this time the defendant F. M. Hubbell, and General Dodge, each bought of the Purchasing Committee certain bonds of the defendant company, and one-eighth of its capital stock (vol. IV, pp. 1599-1601). This sale was ratified by the directors of the Des Moines & St. Louis Company (vol. IV, p. 1434). The stock, therefore, when issued on April 8, 1890, was issued one share to each of the directors of the defendant company, and

To the Purchasing Committee.....	996 shares,
To the Des Moines & Northern Rail-	
way Company (successor to the St.	
Louis, Des Moines & Northern Rail-	
way Company)	998 shares,
To the Des Moines & Northwestern	
Railway Company (successor to the	
Des Moines Northwestern Railway	
Company	998 shares,
To F. M. Hubbell.....	500 shares,
To G. M. Dodge.....	500 shares.

(Vol. II, p. 711.)

Again, on June 5, 1890, F. M. Hubbell bought of the Purchasing Committee an additional 500 shares of stock in the defendant company (vol. IV, p. 1613), which shares were transferred on the books of the defendant company August 28, 1890 (vol. II, p. 711); the

transfer being ratified by action of the Des Moines & St. Louis Company on February 11, 1891 (vol. IV, pp. 1437-8).

On January 15, 1892, the shares of the Des Moines & Northwestern Company, the Des Moines & Northern Company, F. M. Hubbell and G. M. Dodge, amounting altogether to 3,500 shares (less the shares necessary to qualify directors), were transferred to the Des Moines, Northern & Western Railway Company, a consolidation of the Des Moines & Northern Company and the Des Moines & Northwestern Company (vol. II, p. 711).

On October 4, 1893, the Des Moines, Northern & Western Railway Company pledged 2,500 shares of this stock to F. M. Hubbell & Son, as collateral security on certain indebtedness (vol. IV, p. 1480). On January 29, 1894, the Des Moines, Northern & Western Railway Company sold these same shares to F. M. Hubbell & Son in satisfaction of certain indebtedness (vol. IV, pp. 1482-3). These 2,500 shares of stock were transferred on the books of the Des Moines Union Company to F. M. Hubbell & Son October 4, 1893, and have ever since stood in their name (vol. II, p. 711). The capital stock of the defendant company is now owned as follows:

Wabash Railway Company (the remote successor of the Des Moines & St. Louis Railroad Company)	500 shares,
Chicago, Milwaukee & St. Paul Railway Company (remote successors of the Des Moines Northern & Western Company)	1,000 shares,
F. M. Hubbell & Son	2,500 shares.
Making a total of	4,000 shares.

being all the outstanding stock. A few of the shares belonging to each of the above owners stand in the name of the directors of the defendant company, who represent the owners on the Board of Directors.

On this branch of the case the complainants allege that they are the real owners of the terminal property and that defendant company simply holds the title in trust for them, or that that ownership is subject to an easement in their favor which gives them the right to use the property in perpetuity for terminal purposes, upon payment of the actual cost of operation, maintenance and taxes, thus depriving the defendant company from having any beneficial ownership in the property. The real purpose of the suit is to obtain a decree which will render the 2,500 shares of stock owned by F. M. Hubbell & Son of no value.

The amended bill of complaint (Rec., Vol. I, p. 82 et seq.) made numerous charges of gross fraud against the respondents, accusing them of manipulating, falsifying and virtually forging the records of the Des Moines Union Railway Company and other companies involved, so as to sustain their claims, but there is not an iota of evidence in the record to support any of the charges, no evidence was offered with a view to support them and the records in question were received in evidence without objection and indeed were brought into the case by stipulation of the parties.

The amended bill of complaint also charges (Rec. Vol. I, p. 111) that the Hubbells, father and son, and their three other associates, at a meeting of the Directors of the Des Moines Union Railway Company held on March 12th, 1906, "voted to allow additional salaries as follows, namely: To the defendant Frederick C. Hubbell as President of the company, for the

years 1901, 1902, 1903, 1904 and 1905, \$37,500, and to the defendant Frederick M. Hubbell, as Secretary of the company for the same years, the sum of \$12,500."

The proceedings of the meeting mentioned are shown in the Record, Vol. II, pp. 333 to 336, and there is not a word of salary as to either father or son. On the other hand the evidence is undisputed that from the time the terminal company began operations down to the time of the trial, the father gave much of his time and care—and the son made it practically his exclusive occupation—to the conduct of the terminal's affairs and business. And this without a dollar of direct pay. It was done not altogether as a matter of public spirit; they had a large interest in the terminal company and hoped to profit by its welfare and prosperity. And so they labored unceasingly for its development and expansion. And the petitioners accepted these gratuitous services, well knowing that they were being rendered and why they were rendered.

The claim of the respondents is that a good and perfect title to the terminal property passed to the Des Moines Union Railway Company, and that petitioners are estopped from questioning such title by their conduct and laches.

To go into a detailed statement of facts at this point supporting these defenses would serve no useful purpose and would result in unnecessary repetition.

The decree of the Court of Appeals adjudged that the defendant company had a good and perfect title to the terminal property, and that complainants have no interest therein except that which is represented by the stock of the defendant company which they own. It is this portion of the decree which complainants bring up for review by their writ of certiorari.

POINTS AND AUTHORITIES.

I.

THE DEFENDANT, THE DES MOINES UNION RAILWAY COMPANY, ACQUIRED AND POSSESSES A PERFECT TITLE IN FEE SIMPLE TO THE TERMINAL PROPERTY.

The great object in the construction of all instruments is to ascertain the intention of the parties.

Mauran v. Bullus, 16 Pet. 527.

Calderon v. Atlas Steamship Co., 170 U. S., 280.

Insurance Co. v. Trefz, 104 U. S. 203.

United States v. Bethlehem Steel Co., 205 U. S. 119.

Lowber v. Bangs, 2 Wall, 736.

Van Ness v. City of Washington, 4 Pet. 232.

Potomac Steamboat Co. v. Upper Potomac Co., 109 U. S. 681.

II.

THE ARTICLES OF INCORPORATION OF THE DES MOINES UNION RAILWAY COMPANY AND AMENDMENTS THERETO ARE VALID.

Upon the organization of the Des Moines Union Railway Company those who by contract were entitled to shares of stock were actually stockholders, though no certificates evidencing such shares were issued. As between shareholders and the corporation, the issuance of certificates of stock is not necessary.

Thompson on Corporations, 2d ed., vol. 4,
§§ 3455, 3507.

First Nat. Bank v. Gifford, 47 Iowa 583.

Morrow v. Gould, 145 Iowa 4.

Hawley v. Upton, 102 U. S. 316.

Penderey v. Carleton, 87 Fed. 41.

The amendments to the articles of incorporation adopted April 8, 1890 (V. II, 488-94), were valid and are binding upon the stockholders, because:

(a) It is a presumption of law that proper and valid notice of a corporate meeting has been duly given to each stockholder, and the meeting itself regularly and lawfully called.

Cook on Corporations, 6th ed., vol. 2, § 600.

Chase v. Tuttle, 12 Atl. (Conn.) 874.

Hill v. Ry. Co., 55 S. E. (N. C.) 854.

Porter v. Robinson, 30 Hun. 209.

Pitts v. Temple, 2 Mass. 538.

Benbow v. Cook, 20 S. E. (N. C.) 453.

Hardin & Sons v. Iowa Ry. & Const. Co., 78 Iowa 726.

Moore v. Church, 117 Iowa 33.

(b) The presumption is that the minutes of a stockholders' meeting or of a meeting of a Board of Directors are correctly and properly entered of record, and while it is allowable to contradict the records of a corporation or show that the records do not fully disclose all the proceedings, the rule is that the proof in such cases must be so convincing and satisfactory as to leave no doubt that the matter attempted to be interpolated into the record did actually occur.

Thompson on Corporations, 2d ed., vol. 2, §§ 1845-6.

Hawkshaw v. Supreme Lodge, 29 Fed. (C. C.), 770.

Thompson on Corporations, 2d ed., vol. 2, §§ 1850-1.

Cook on Corporations, 6th ed., vol. 2, §§ 600, 605, 610.

In the Matter of the Election of St. Lawrence Steamboat Co., 44 N. J. L. 534.

Dennis v. Joslin Mfg. Co., 36 Atl. (R. I.) 129.

Durbrow v. Hackensack M. Co., 71 Atl. 59.

Heintzelman v. Druids' Relief Assn., 36 N. W. (Minn.) 100.

Sanborn v. School District, 12 Minn. 1.

McDaniels v. Flower, 22 Vt. 274.

Lane v. Brainerd, 30 Conn. 565.

(c) The adoption of the amendments and the resolutions were acts of the stockholders (acts of complainants' predecessors as distinguished from the acts of the defendant corporation). The articles of incorporation constituted a contract between the stockholders, the terms of which they had the right to change in the manner therein pointed out, without the consent of the corporate entity.

Thompson on Corporations, 2d. ed., vol. 1, §§ 172, 312.

Jones v. Electric Co., 144 Fed. 765 (C. C. A.).

Heald v. Owen, 79 Iowa 25.

Traer v. Prospecting Co., 124 Iowa 112.

(d) The amendments to the articles were properly signed, acknowledged and recorded, and notice thereof was given as required by the Iowa statute.

The statute law in force on April 8, 1890, was as follows:

"That any of the provisions of the Articles of Incorporation may be changed at any annual meeting of the stockholders or special meeting called for that purpose; but said changes shall not be valid unless recorded and published as the original articles are required to be; and said changes in the Articles need only be signed and acknowledged by the officers of said Corporation." (Ch. 88, Acts 22d G. A. [1888].)

"Previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, and recorded in the office of the Recorder of Deeds of the county where the principal place of business is to be, in a book kept therefor; the Recorder must record such articles as aforesaid, within five days after the same are filed in his office, and certify thereon the time when the same was filed in his office, and the book and page where the record thereof will be found. The said articles and certificate of Recorder shall be then recorded in the office of Secretary of State, in a book kept for that purpose." (Ch. 23, Laws, 17th G. A. [1878].)

"A notice must be published for four weeks in succession in some newspaper as convenient as practicable to the principal place of business, which must contain: * * *" (Sec. 1613, Code of Iowa, 1897, in force on April 8, 1890.)

The purpose of these statutory provisions is to give to the world (which includes the stockholders), notice of the articles of incorporation and amendments thereto.

Dempster Mfg. Co. v. Downs, 126 Iowa 80.

It is a presumption of law that all stockholders assent to any change in the articles of incorporation.

Holmes v. Royal Loan Assn., 107 S. W. (Mo.) 1005.

Cook on Corporations, 6th ed., vol. 2, § 503.

A dissenting stockholder must act promptly.

Cook on Corporations, 6th ed., vol. 2, § 503.

Rabe v. Dunlap, 25 Atl. (N. J.) 959.

Synnott v. Cumberland Bldg. Loan Assn., 117 Fed. 379 (C. C. A.).

Big Creek Gap Coal & Iron Co. v. American L. & T. Co., 127 Fed. 625 (C. C. A.).

Thompson v. Lambert, 44 Iowa 239.

Foster v. Mansfield, etc., 146 U. S. 88.

The complainants cannot raise the question of the validity of these amendments, because they acquired their stock and all interest in the property subsequent to the adoption of such amendments.

Equity Rule No. 94.

III.

THE COMPLAINANTS ARE ESTOPPED FROM ASSERTING THAT THE TITLE TO THE TERMINAL PROPERTY IS NOT VESTED ABSOLUTELY IN THE DES MOINES UNION RAILWAY COMPANY, AND FROM CLAIMING THAT THE STOCK OF THE COMPANY HELD BY THE DEFENDANT, F. M. HUBBELL & SON, DOES NOT REPRESENT A VALUABLE INTEREST IN SUCH PROPERTY, BECAUSE ALL THE PARTIES HAVE ACTED UPON THAT THEORY SINCE 1888

(ALMOST TWENTY YEARS PRIOR TO THE COMMENCEMENT OF THIS SUIT), AND BECAUSE, RELYING UPON THE DEEDS, CONTRACTS, RESOLUTIONS, AND ACTS BY WHICH THE COMPLAINANTS' PREDECESSORS TRANSFERRED THE PROPERTY TO DEFENDANT, AND THE ACTS OF THE COMPLAINANTS IN RESPECT THERETO, THE HUBBELLS PURCHASED OF COMPLAINANTS' PREDECESSORS STOCK IN THE DEFENDANT COMPANY FOR A VALUABLE CONSIDERATION, AND DEVOTED MANY YEARS OF THEIR LIVES TO THE CONSERVATION AND BUILDING UP OF THE PROPERTY, WITHOUT OTHER COMPENSATION THAN THAT WHICH THEY WILL SECURE BY REASON OF THE INCREASE IN THE VALUE OF THEIR STOCK.

The doctrine of estoppel always applies where one relying upon the acts and representations, either active or passive, of another, changes his position in respect to the subject matter.

Encyc. U. S. Supreme Court Rep., Vol. 5, p. 939.
Morgan v. Railway Co., 96 U. S. 716.
Kirk v. Hamilton, 102 U. S. 68.
Linton v. Nat. Life Ins. Co., 104 Fed. 584.
Given v. Times Printing Co., 114 Fed. 92.
Wright v. Lieth, 146 Iowa 290.
Seberg v. Bank, 141 Iowa 99.
Anderson v. Buchanan, 139 Iowa 676.
Morgan v. Des Moines Union Ry. Co., 113 Ia. 561.

IV.

THE COMPLAINANTS ARE ESTOPPED FROM MAINTAINING THIS SUIT BECAUSE OF THEIR LACHES.

For nearly twenty years prior to the bringing of this suit complainants and their predecessors knew all the facts; knew that the Des Moines Union Railway Company claimed to be the absolute owner of this property, and for seventeen years prior to the bringing of the suit knew that the Hubbells were acting in the belief that the stock owned by them represented a valuable interest in the terminal property.

Under ordinary circumstances a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous limitation at law.

Wymax v. Bowman, 127 Fed. 257 (C. C. A.).

Williams v. Neely, 134 Fed. 1 (C. C. A.).

Railway Co. v. Stevenson, 135 Fed. 553 (C. C.).

Section 3447 of the code of Iowa, 1897, provides:

"Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

* * * * *

... * * Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years."

Pomeroy, Eq. Jur. Vol. 5, Sec. 23 says:

"No doctrine is so wholesome when wisely administered as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many."

Galliker v. Cadwell, 145 U. S. 368.

The title and ownership of property is to be determined by the law in force in the state in which the property is located.

Kerr v. Moon, 9 Wheat 565.

McCormick v. Sullivan, 10 Wheat. 192.

Section 2918 of the code of Iowa, 1897, provides:

"Declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law."

The statute of limitations commences to run as to resulting trusts at the time of the creation of the trust.

Boose v. Chiles, 10 Pet. 177, 222.

Speidel v. Henrici, 120 U. S. 377, 386.

If there was ever an express trust in this case, it was expressly repudiated at the time of the amendments to the articles of incorporation of the Des Moines Union Railway Company on April 8, 1890, and the passage of the resolutions at that meeting.

Suits to establish implied trusts fall within the class of cases in which federal equity courts will follow the courts of law in applying the statute of limitations.

Beaubien v. Beaubien, 23 How. 190, 207.

Speidel v. Henrici, 120 U. S. 377, 386.

Riddle v. Whitehill, 135 U. S. 621.

Abraham v. Ordway, 158 U. S. 416, 420.

Penn. M. L. I. Co. v. Austin, 168 U. S. 685, 696.

Baker v. Cummings, 169 U. S. 189, 206.

V.

THE SALE AND TRANSFER OF THE TERMINAL PROPERTY TO THE TERMINAL COMPANY WERE NOT VOID AS AGAINST PUBLIC POLICY.

The organization of terminal companies and terminal systems is a natural and logical development in centers of population and is recognized as good public policy by the courts.

Morgan v. Des Moines Union, 113 Ia. 561.

United States v. Terminal R. R. Assn. of St. Louis, 224 U. S. 401.

Attorney General v. Terminal R. R. Assn., 182 Mo. 284.

People ex rel. v. Cheesman, 7 Colo. 376.

State ex rel. v. Martin, 51 Kans. 462.

Mayor v. Norwich R. R. Co., 109 Mass. 103.

Union Depot Co. v. Morton, 83 Mich. 265.

Secs. 2099, 2130, Code of Iowa, 1897.

But, assuming that the original transaction was *ultra vires* as against public policy, the transaction was a completed one nearly twenty years prior to the commencement of this suit, and the courts will not now disturb it.

St. Louis, Etc., R. R. Co. v. Terre Haute, Etc., R. R. Co., 145 U. S. 393.

ARGUMENT.

I.

THE DEFENDANT, THE DES MOINES UNION RAILWAY COMPANY, ACQUIRED AND POSSESSES A PERFECT TITLE IN FEE SIMPLE TO THE TERMINAL PROPERTY.

The solution of this question does not, we think, involve any difficult or seriously disputed questions of law, but simply an examination of the origin and evolution of the terminal property. In its consideration it is well to start at the beginning and consider the origin and growth of the property, step by step, to determine the objects and intentions of the various corporations and persons who had to do with the transaction.

The first item for consideration is the contract of December 8, 1880, between the Wabash, St. Louis & Pacific Railway Company and J. S. Polk and others, which provided for the organization of the Des Moines & St. Louis Railroad Company (the remote predecessor and grantor of the Wabash Railway Company), and the construction by that company of a line from Albia to Des Moines with funds to be furnished by the Wabash, St. Louis & Pacific Railway Company, which line when constructed was to be leased in perpetuity to the last named company (Vol. II, p. 396).

This contract is of no great importance except that it furnishes a starting point for the consideration of this case and the origin of the scheme out of which the terminal proposition grew. The line from Albia to Des Moines was constructed as contemplated in the contract, and leased to the Wabash Company.

On the same date the Wabash, St. Louis & Pacific Railway Company entered into a written contract with the Des Moines Northwestern Railway Company and the Narrow Gauge Construction Company (Vol. II, p. 400), which recites the fact that the Des Moines Company owned a railroad from Waukee, a point on the Des Moines & Fort Dodge Railroad about fifteen miles west of Des Moines, to Panora; recites the making of the contract between the Wabash Company and J. S. Polk and others heretofore referred to, contemplating the construction and lease of the railroad of the Des Moines & St. Louis Company, and the desire of the Wabash Company to obtain the business originating on the road of the Des Moines Company, and provides for the extension of the road of the Des Moines Company in a northwesterly direction and also to Des Moines, and among the provisions are the following (p. 406) :

“It is further mutually agreed by and between the parties above named, that if certain pending negotiations between the Wabash Company and the Des Moines & Fort Dodge Company shall result in the Wabash Company’s acquiring control, by lease or otherwise, of the Des Moines and Fort Dodge Road, then the Des Moines Company shall have the right (upon terms to be fixed by agreement of the parties, otherwise to be settled under the general provisions herein made for arbitration) to extend its line into Des Moines by laying a third rail upon the Des Moines & Fort Dodge Road.

It is further mutually agreed by and between the parties above named, that if the pending negotiations between the Wabash Company and the Des Moines & Fort Dodge Company shall fail, then the railroad of the Des Moines Company shall be

extended to a connection with the railroad of the Des Moines & St. Louis Company, at or near Des Moines, substantially under the provisions of the foregoing agreement, but with such modifications as the greater cost of such extension may require. The Des Moines Company shall in that case have full right of entry into Des Moines, by laying a third rail on the Des Moines & St. Louis Roal, and full use of the terminal facilities of that road, upon terms to be settled by agreement between the Des Moines Company and the Wabash Company, or else under the arbitration elsewhere provided for herein.

It is further agreed on the part of the Wabash Company that if it shall acquire control of the Des Moines & Fort Dodge Road, then the Wabash Company will permit the Des Moines Company to lay down a third rail on the track of the Des Moines & St. Louis Road, from the terminus of the Fort Dodge Road, in the City of Des Moines, eastwardly far enough to reach such pork houses and other sources of freight as are on the east side of the City of Des Moines, and are reached by the tracks of the Des Moines & St. Louis Road."

On page 989 of volume III appears an entry on the books of the Wabash Company made in April, 1881, as follows:

"For the following payments for a/c of real estate in the City of Des Moines, Iowa, charged to Des Moines & St. Louis R. R. in the months of Feb'y, March and April, 1881, now transferred to real estate Des Moines, the property being held for joint account of the Des Moines & St. Louis and Des Moines & North Western Rys., as per letter of James S. Clarkson, Pt. filed herewith:"

And then follow various items of expenditure which had theretofore been made for a terminal property in the City of Des Moines and charged to the Des Moines & St. Louis Railroad Company.

The foregoing contracts and this entry show that it was originally contemplated that the terminal property in the City of Des Moines should be owned by the Des Moines & St. Louis Roailroad Company and not by a terminal company and not jointly by that road and the Des Moines Northwestern Railway Company.

The entry on the books of the Wabash above referred to shows that this plan as originally contemplated was changed in April, 1881, to a plan which contemplated that the terminal property should be owned jointly by the Des Moines & St. Louis and the Des Moines Northwestern companies, because at that time the charge upon the Wabash books was changed from a charge against the Des Moines & St. Louis to a charge against Real Estate Des Moines, to be held for the joint account of the two companies named.

In April, 1881, there were adopted under the laws of the State of Iowa articles of incorporation of the St. Louis, Des Moines & Northern Railway Company (Vol. II, p. 729), for the purpose of constructing a line of railway from the City of Des Moines through Boone, Iowa, toward the north line of the state.

This company proceeded toward the construction of this line of road, and also a branch from Clive, a station about five miles west of Des Moines, to Waukee, and on January 23, 1882, it made a contract with the Des Moines Northwestern Railway Company by which it sold to the latter company the branch from Clive to Waukee, and a one-half interest in the line from Waukee to Farnham street in Des Moines (the western

limit of the terminal property), giving the Des Moines Northwestern entrance into the City of Des Moines.

This shows that the plan of the Wabash Company to acquire a control of the Des Moines & Fort Dodge line failed, and the entrance of the Des Moines Northwestern Company into Des Moines was secured through this contract with the St. Louis, Des Moines & Northern Railway Company.

On January 2, 1882, a contract was entered into between the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, G. M. Dodge, James F. How and James F. How, trustee (Vol. II, p. 411), which shows that another change was made in the plan for a terminal in the City of Des Moines and by which it was contemplated that the terminal property should be owned and operated jointly by the three railway companies—the Des Moines & St. Louis Railroad Company, the St. Louis, Des Moines & Northern Railway Company, and the Des Moines Northwestern Railway Company.

This contract recited the fact that the three companies desired to own and operate jointly terminal facilities in the City of Des Moines and use the same in common; that certain purchases had been made of real property in the said city in the name of James F. How, individually, and James F. How, trustee, and Grenville M. Dodge, and certain additional property had been appropriated by the Des Moines & St. Louis Railroad Company, and the construction of buildings and other improvements thereon had begun. It was agreed that the expense thereof should be borne one-half by the Des Moines & St. Louis Company and one-fourth each by the other companies, and that a depot

company might be organized to take permanent charge of the property upon the terms set forth in the contract. It specifically provided that the title to said property should be and remain in a trustee to be named by agreement of the said companies, and subject to the joint use and occupation of all the railway companies upon the terms therein contained; that the Des Moines & St. Louis Company should be charged with the police control and supervision and maintenance of the property, and that the expense thereof should be apportioned among the companies upon a wheelage basis. Other provisions were made in the contract not necessary to be here mentioned.

It will be seen from the foregoing that up to this time three different schemes had been adopted for this terminal property:

First. that it should be owned exclusively by the Des Moines & St. Louis Railroad Company.

Second. That it should be owned jointly by the Des Moines & St. Louis and the Des Moines Northwestern Railway Company.

Third. That it should be owned jointly by the three companies parties to the contract last above mentioned.

A short time prior to this date, on December 1, 1881, the Des Moines & St. Louis Railroad Company mortgaged its property to the Central Trust Company of New York (Vol. II, p. 509). This mortgage specifically excepted the terminal property in the City of Des Moines, the exception being in the following language (p. 511):

"except the real estate, buildings and improvements thereon lying and being within the corporate limits of the City of Des Moines."

thus showing that the terminal property was to be handled as a proposition separate from the main line of the Des Moines & St. Louis Road.

Counsel for petitioners devote much time and space to a discussion and an analysis of this contract and the rights of the railway companies thereunder. To our mind the rights acquired by the railway companies by this contract are simple and easily stated. By its terms the three railway companies became the beneficial owners of the property.

Here it is proper to note that the ownership of the three railway companies was not equal, but one-half by one and one-fourth by each of the others. The usual and ordinary rights and incidents of ownership were recognized by the parties. They contemplated use of the property by other railway companies, for which those other companies were to pay. And what was to be done with the money received from such sources? Was it to go to the three in equal measure? By no means. It was distributed among them in the ratio of ownership. Section 10 of the contract of January 2nd, 1882 expressly provides "the rental to enure to the companies hereto in the same proportion as the original outlay." Vol. II, p. 413.

Each Company owned an undivided interest in the property, with the right to use the whole property for railway purposes. Whether, as between the three railway companies, we term the right of one company to use the whole property for railway purposes an easement, or what not, is entirely immaterial. Considering the three railways together, they not only owned

the property, but had the right to direct the trustees, How and Dodge to transfer the legal title to them or to any one whom they might select. As a result, they had absolute dominion over the property, with the right to continue to use it in accordance with the strict terms of the contract, or to make any other disposition of it to which the three railway companies could agree. They might by agreement have placed the legal title in a trustee, reserving to themselves the beneficial ownership; they might have transferred the property to a third person, reserving in themselves an easement; or they might have made any other disposition of it upon which they could agree. In other words, their power of disposition of this property was unlimited because they were its owners. The question we have for solution is what disposition they in fact did make of it, and for this purpose we must examine their subsequent acts and from them and the surrounding circumstances ascertain the true intent of their acts.

In this connection, however, it must be noted that looking forward to possible changes in their terminal plans, as the future might develop the necessity therefor, the parties had carefully segregated the terminal property from their main lines, as see the provision in the Des Moines & St. Louis mortgage above noted, eliminating the terminal property therefrom, the deed and contract above noted between the St. Louis, Des Moines & Northern Company and the Des Moines Northwestern Company, which limited the transfer to property west of the terminal, and to the mortgage given by the St. Louis, Des Moines & Northern to the Mercantile Trust Company (Vol. II, p. 552), which only covered property extending "from the western

boundary line of the City of Des Moines," etc. (p. 554).

The significance of these changes in the plan for the terminal property, and its careful segregation from the main lines, lies in the fact that they indicate that the terminal plan was in a formative stage, and the parties wished to so manage it that any desired change might be made in the future. It is for us to determine if such changes were made.

Subsequent to the making of this contract of January 2, 1882, additional property was acquired, improvements made thereon, and the property for some years was used jointly by the St. Louis, Des Moines & Northern Railway Company and by the Wabash Company, lessee of the other two companies.

Among the things which were contemplated by these railway companies with respect to this terminal property, as shown by these contracts already referred to, was that other companies should be induced to use it to the end that the expense of operating it might be lessened. The impracticability of thus operating the terminal property and having two or more railway companies operating over it indiscriminately is apparent upon reflection, and it is apparent that its impracticability became impressed upon the persons engaged in operating it, for we find that in 1884 steps were taken to change the method of operation and to provide for its operation by a terminal company, and in this step we have the first evidence of a change of the plan as outlined in the contract of January 2, 1882.

At this point we are aided by a concession made by counsel for the Chicago, Milwaukee & St. Paul Railway Company on page 13 of their argument in the Court of Appeals, as follows:

"It needs no railroad man to know that such use in common by three different companies, without any central head or management, would lead to confusion and to danger. It was quite natural, in fact necessary, that the control and management and in fact the operation of this property should be put in charge of some one individual, or some natural or artificial person."

In ascertaining the changes that were made in the terminal plans as outlined in the contract of January 2, 1882, we may therefore start with the concession that those plans had proved impracticable and the necessity for a change had become apparent.

At the instance of the three railway companies parties to the contract of 1882 a meeting of the incorporators of the defendant, the Des Moines Union Railway Company, was held in Des Moines, Iowa, at which were adopted the original articles of incorporation of the defendant company (Vol. II, pp. 416-23). The articles adopted set out by reciting the fact of the execution of the contract of January 2, 1882, and incorporate the contract as a preamble to the articles.

Counsel for petitioners have attempted to make much of the recitations contained in these articles of incorporation and in the minutes of the meeting at which they were adopted, but an examination of them will, we think, demonstrate that they support our view of this case. The first recitation is as follows (p. 416):

"At a meeting held in Des Moines, Iowa, on the 10th day of December, 1884, for the purpose of organizing a Union Depot & Railroad Company to be run and operated in and around the City of Des Moines, Iowa, in pursuance of a contract heretofore, to wit: on the 2nd day of January, A. D. 1882, entered into * * *."

It will be noted that the purpose of this meeting is stated to be the organization of a "*Union Depot & Railroad Company to be run and operated in, around and about the City of Des Moines, Iowa.*" The contract of January 2, 1882, did not by its terms provide for a railroad company which should operate a railroad in and around the City of Des Moines, but only for a depot company which would simply have permanent charge of the property, without the power of ownership or operation. This demonstrates a change in the plans of the parties.

After setting out the contract the articles provide:

"Whereas each of said railway companies and said parties has expended large sums of money in purchasing and improving the property aforesaid, and in the construction of suitable buildings for the use of said company, and " (p. 419).

This recitation did not accurately state the facts. As a matter of fact, neither one of the three railway companies had contributed a dollar directly toward the purchase or construction of this terminal property. The money used for its purchase and construction had all been furnished by the Wabash Company and by General Dodge. No one else had put a dollar into it. The only way in which the three railway companies, parties to the contract of January 2, 1882, put any money into it was that the Wabash Company had charged the money advanced to these three companies.

The articles then recite:

"Whereas it was provided in the contract aforesaid that a Depot Company might be organized to

take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto."

This recitation shows one of two things: either that the contract of 1882 did not correctly state the understanding of the parties, or that the plan for the terminal had changed since the execution of that contract. It recites that "*it was the understanding of the parties that such company might acquire, operate and maintain said property.*" No such understanding can be found in the language of the contract. The contract provides that the property should be acquired by the three railway companies, though the title might be taken in the name of a trustee; that it should be operated by them jointly, and that it should be maintained by the Des Moines & St. Louis Railroad Company, while this recitation evidenced the fact that it was the understanding that the property should be acquired, operated and maintained all by a separate company.

The articles then continue (p. 420):

"Now, therefore, for the *purposes aforesaid*, as well as for those *hereinafter expressed*, the undersigned hereby associate themselves in a body corporate, and adopt the following:"

The object, then, of organizing the defendant company was not merely to provide a depot company referred to in the contract, but for other purposes. One of the "*purposes aforesaid*" was that "*such company might acquire, operate and maintain said property.*"

and the purposes "hereinafter expressed" must be those which are subsequently contained in the articles of incorporation.

Article 1 provides that the name of the corporation shall be the Des Moines Union Railway Company. This name is significant in fixing the intention of the parties. It wasn't a mere depot company or a company organized for the purpose of holding the legal title to the terminal property in trust, but it was a corporation organized for the purpose of performing the duties and functions of a railway terminal company.

As will appear later there is great difference under the laws of Iowa between a depot company and a railway company. The Des Moines Union is a railway and terminal company.

Article 2 provides:

"The general nature of the business to be transacted shall be the *construction, ownership and operation of a railway* in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of depots, freight houses, railway shops, repair shops, stockyards and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Iowa, as well as the transfer of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, storehouses, or elevators to each other or to any of the railways or depots thereof, now constructed or to be hereafter constructed, in or around said City of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by Chapter I of Title IX of the Code, and the amendments thereto."

This article provides that this railway company shall exercise the following powers and duties not contemplated by the contract of January 2, 1882:

- (1) The construction of a railway;
- (2) The ownership of a railway;
- (3) The operation of a railway;
- (4) The construction of depots, freight houses, railway shops, repair shops, stockyards, and whatever else may be useful and convenient for the operation of a railway at the terminal point in Des Moines, Iowa;
- (5) The ownership of such depots, freight houses, etc.;
- (6) The use of such depots, freight houses, etc.;
- (7) The transfer of cars from the line or depot of one railway to another;
- (8) The transfer of cars from the various manufacturers, warehouses, storehouses, or elevators to each other or to any of the railways or depots now constructed or hereafter constructed in or around the City of Des Moines;
- (9) The possession of all powers conferred upon corporations for pecuniary profit by Chapter I, Title IX of the Code, and the amendments thereto.

None of these nine functions was contemplated by the contract of January 2, 1882. It is evident from these provisions that the plan of ownership and operation of the terminal property had changed since the making of that contract.

It is then provided in article 2 in part as follows (p. 420):

“* * * All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882.”

Much time and space has been devoted to a discussion of this provision by counsel for petitioners. In its interpretation we must give force and effect to other provisions in the articles of incorporation and the acts and conduct of the parties in relation thereto. This provision is purely interpretative in its character and cannot serve to qualify any provision of the articles which is clear and express in its terms, nor can it nullify any grant of power to the Des Moines Union Company clearly made by the articles. Manifestly, it cannot be construed to nullify or modify the power of the terminal company to construct, own and operate a railway in, around or about the City of Des Moines, because these powers are expressly granted. Manifestly, also, it cannot mean that the terminal property is to be owned or operated according to the terms of the contract of January 2, 1882, because that contract provides for the ownership by the three railway companies; provides for its operation by the three railroad companies jointly, and provides for police control, supervision and maintenance by the Des Moines & St. Louis Railroad Company.

From the beginning these parties had in mind the construction of terminal facilities in the City of Des Moines separate from their main systems, as well in ownership as in operation, which might be used by all of them as well as others in connection with the oper-

ation of their roads. This primary object was never departed from. The departures which were made were with respect to the method by which this primary object should be attained.

Article 3 provides:

"The capital stock of this corporation shall be one million (\$1,000,000.00) dollars, which shall be divided into shares of one hundred (\$100.00) dollars each, and shall be paid in at such times and in such manner as the board of directors may determine, and the board are authorized to receive in payment therefor the property and franchises in the City of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, trustee, Jas. F. How and Grenville M. Dodge."

This article clearly contemplates two things not contemplated by the contract of January 2, 1882:

- First. That the stock should be paid for when issued.
- Second. That it might be paid for by a transfer of the terminal property and franchises.

It needs no argument to show that these purposes were not contemplated by that contract, and that it evidences a change in the plan.

Under the contract of January 2, 1882, the three railway companies owned this terminal property, although it was contemplated that the title thereto might stand in the name of the trustee. As such beneficial owners, and under that contract, they had power to control it because they owned it and because of the terms of the contract.

Counsel for the Wabash Company, speaking of what was intended to be represented by this stock, on page 209 of his Coprt of Appeals brief, frankly says:

“ * * * I think it axiomatic that a corporation takes absolutely that which is transferred to it in exchange for its shares of stock, and, accordingly, that the Depot Company does not hold the servient estate in trust, but absolutely.”

The question here is, what was intended, by the article above quoted, should be received by the terminal company in exchange for “its shares of stock.”

The article says, first, that it shall receive “the property and franchises in the City of Des Moines now held by the Des Moines & St. Louis Railroad Company.”

Under the contract of January 2, 1882, the Des Moines & St. Louis Railroad Company owned a one-half interest in the terminal property, which included not only the real estate where absolute title had been acquired by deed, but also the easement or right of way over property acquired by condemnation proceedings or right of way deed; also the embankments, ties, rails, buildings, and other structures located upon the property and used in connection with the operation of the terminal; also the franchise or right to use the property for terminal purposes. All these were property and were the things that were contemplated should be transferred to the terminal company in exchange for its stock.

Likewise, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railroad Company owned and held each a one-fourth interest in the same property. James F. How and Grenville M. Dodge held the legal title to a por-

tion of the real estate. The whole property and every interest therein was owned and held by these three railroad companies and the trustees, and it was this property which it was contemplated should be transferred for the stock—therefore adopting the axiom stated by counsel for the Wabash; this article contemplated that the terminal company should take "absolutely" the whole terminal property "in exchange for its shares of stock."

It evidently was their desire to change the status of the property and turn it over to a separate corporation which should own and operate it, but in connection therewith they did not desire to lose their power of control and therefore it was in their opinion necessary to put something into the articles of incorporation by which a limitation should be placed upon the power of the terminal company to control the property, and in article 2 they provide:

"• • • All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882, by and between the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Jas. F. How, trustee, and Grenville M. Dodge. The said company shall have the right to lease or otherwise dispose of the use of any part of its franchises to any other railway company—provided that the assent in writing of the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company shall be necessary before any such lease or disposition can be made to any other than the parties above named."

And in article 4 it was provided:

“Four members of the board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St. Louis, Des Moines & Northern Railway Company, and no stockholders shall be eligible for membership of the board unless so nominated.

The fact that a candidate has been duly nominated shall be certified to the stockholders' meeting of this company by the secretary of one of the respective companies aforesaid and such certification shall be conclusive.

The provisions herein with respect to nomination for the board of directors shall apply to and be enjoyed by any grantee or assignee of either of the railway companies aforesaid. No contract, lease, or other agreement, amounting to a permanent charge upon the property of the corporation, shall be entered into by the board unless the same shall have been first approval by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, or their assigns, and shall have been submitted to a meeting of the stockholders, duly called, and shall have been approved by more than three-fourths of all the stockholders; and it shall not be within the power of the board of directors to create any limitation whatsoever upon any of the franchises of the corporation, except the same shall have been submitted to and approved by the stockholders as hereinbefore provided.”

Now, it wasn't necessary to put these provisions into the articles of incorporation if it was not intended to give the terminal company the title and ownership of the property. If the terminal company simply was to

hold the property as trustee, it would have no power to dispose of or encumber it without the consent of the beneficial owners. So these provisions, instead of showing that it was intended that the three railway companies should retain an interest in the property, show that it was intended that the terminal company should own the property, but these provisions were put in as a limitation upon the power of the corporation to alienate its property.

Now, of course, the adoption of these articles did not change the title or ownership of the terminal, but they clearly indicate the purpose of the parties instrumental in organizing it to transfer the ownership and title, just the same as the building of a house would indicate the purpose of the builder that some one should live in it.

These articles were adopted on the 10th day of December, 1884. On the 1st day of January, 1885, there were certain resolutions passed at meetings of the stockholders of the three corporations parties to the contract of January 2, 1882. To correctly understand what was intended by these resolutions it is well to consider first the resolutions adopted by the Des Moines Northwestern Railway Company. This company did not hold the legal title to any portion of the terminal property. The only interest it had in the property was that evidenced by the contract of January 2, 1882, under the terms of which it was the beneficial owner of a one-fourth interest.

The resolutions appear commencing at page 426 of volume II, and in them it is first

"Resolved, that this company ratifies and approves the selection heretofore made of J. S. Polk and F. M. Hubbell to serve as directors of the Des Moines Union Railway Company in accordance with the provisions of article four (4) of the articles of incorporation of that company authorizing this company to nominate two members of the board of directors of said company."

In connection with this resolution it is important, for reasons which we will hereafter state, to note that from the organization of the Des Moines Union Railway Company down to the adoption of certain amendments to the articles of that company, the three railway companies parties to the contract of January 2, 1882, exercised the power given them in article 4 of the articles of incorporation, to nominate directors of the Des Moines Union Railway Company.

The resolution then continues:

"Whereas, the Des Moines, St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, G. M. Dodge, James F. How, and James F. How, trustee, on the 2nd day of January, 1882, entered into a contract whereby it was agreed to purchase, hold, control and use certain real estate and franchises in the City of Des Moines which had theretofore been held and used by certain of the individual parties hereto for certain purposes and upon certain conditions set out in said contract, and"

The only importance of this recitation is to indicate that the subject matter of the resolutions which follow.

The resolution then continues:

"Whereas, on the 10th day of December, A. D. 1884, a corporation under the name and style of the Des Moines Union Railway Company was organized as contemplated and provided in the aforesaid contract, *to acquire, hold, use and enjoy* the real estate, property rights and franchises in the City of Des Moines east of Farnham street in said city of the aforesaid railway company and signatories of said contract acquired or held thereunder, and to carry out the purposes of the said contract of January 2nd, 1882."

Note the use of the word "*enjoy*" in connection with the above resolution. This corporation was organized not only to acquire, hold and use the real estate, but also to *enjoy* it. We take it that the word "*acquire*" used in this connection means to get the title to the property; the word "*hold*" means to be possessed of it; the word "*use*" means to operate it for the purpose of carrying on a railway business, and the word "*enjoy*" means to derive a profit or benefit from the acquiring, holding and using of the property. The things which it was contemplated this terminal company was to "*acquire, hold, use, and enjoy*" were, *first*, the real estate; *second*, the property rights, and *third*, the franchises. These three words comprised all the interest which the three railroad companies or the trustees had in the terminal property.

The resolution then continues:

“Now, Therefore, Resolved, That this company accepts and ratifies so far as its interests are affected thereby, the Articles of Incorporation of the Des Moines Union Railway Company as in substantial accord and compliance with the terms and conditions of the said contract of January 2nd, 1882, and undertakes to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of said Des Moines Union Railway Company.”

Note that this resolution accepts and ratifies the articles of incorporation of the defendant railway company, as in substantial accord and compliance with the terms of the contract. When they ratified the articles of the Des Moines Union Railway Company they ratified that portion which gave to that railway company the power to own, construct and operate a terminal property in the City of Des Moines, and the power to acquire the ownership of this particular property and pay therefor by an issuance of its stock, as well as any other portion of the articles of incorporation. And note, also, that by this resolution they undertook to make effective the purposes of the Des Moines Union Railway Company, which were to acquire the ownership, management and control of this terminal property, and to pay therefor by an issuance of its capital stock.

This resolution adopted by each of the three railway companies relative to the articles of incorporation, recites the execution of the contract of 1882, the adoption of the articles of incorporation, that it was such a corporation as contemplated in the contract, and that the corporation so contemplated was to acquire, hold,

use and enjoy all of the property in question; and then it is resolved that the railway company accepts and ratifies the articles of incorporation as in substantial accord and compliance with the terms and conditions of the contract of 1882, and the company "undertakes to discharge all the obligations imposed upon it by said contract, in order to make effective the *purposes of said Des Moines Union Railway Company.*"

The resolution then continues:

"Resolved, That the proper officers of this company be authorized upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company to which it may be entitled under said contract to convey, assign and transfer to said company all its right, title and interest of whatever name and character in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines east of Farnham street in said city now held, enjoyed or claimed by either or all of the signatories of said contract of January 2, 1882, or any agent or trustee thereof purchased, acquired, or held in pursuance of said contract."

Now, what was it, the transfer of which was intended by the stockholders to be authorized by this resolution? Was it something which it had, or something which it didn't have? The Des Moines Northwestern Railway Company did not have the *legal* title to a single shovelful of dirt, a single tie, a single rail or spike, or any other portion of the terminal property. What it had, and all it had was the beneficial interest in one-fourth of the property contemplated by the contract of January 2, 1882.

If it had been intended to authorize the transfer only of the legal title to the property, there would have been no occasion whatever for the passage of this resolution. What would have been necessary for such a purpose would have been a resolution authorizing the persons who held the legal title to make the transfer. The only purpose of this resolution was to authorize the transfer of something which it had, which as we have said, was the beneficial ownership of a one-fourth interest in the property, and this is exactly what the language of the resolution authorizes. It says:

"assign and transfer to said company all its right, title and interest of whatever name and character in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines."

which is covered by the contract of January 2, 1882.

What possible interest did or could the Des Moines Northwestern Railway Company have had in this property which was not authorized to be transferred by this resolution? What right, title or interest is reserved by the terms of this resolution? What more appropriate language could have been selected to express an intention to transfer the *ownership* of the property?

The resolutions speak of carrying out the purposes of the contract of January 2, 1882. That was precisely what they were doing, and doing it by transferring the terminal property to the terminal company and taking to themselves the stock of the terminal company. Through this stock ownership they could control the terminal company.

On pages 40 and 41 counsel for the Milwaukee Company in their Court of Appeals brief discuss the rights

of that company as the successor of the Des Moines Northwestern Railway Company (owner of the Fonda line), and assert that by the contract of January 2, 1882, the Des Moines Northwestern Company acquired a one-fourth interest in the terminal property, and then say:

"Now, two questions arise. Could any conveyance or any act of the St. Louis Company and the Northern Company, or either of them, cut off or destroy this right of the Northwestern Company, which they had solemnly granted to it by the contract of January 2, 1882? Or has the Northwestern Company or its successors ever done anything that would destroy or convey away this right to the use of this property?"

The answer to the first query above quoted is, of course, no. The rights of the Northwestern Company could only be cut off by its own action or that of its successors. When we come to answer the second question as to what the Northwestern Company or its successors have done to convey its interest in this property, the answer is easy.

In the Milwaukee's chain of title there appear the following owners of the property in the order named:

1. The Des Moines Northwestern Company.
2. Polk & Hubbell, who acquired the property in pursuance of a contract with the Wabash purchasing committee, and through a foreclosure of the original Des Moines Northwestern mortgage.
3. The Des Moines & Northwestern Railway Company, which acquired the property from Polk & Hubbell.

4. The Des Moines Northern & Western Railway Company, which acquired the property by the consolidation of the Boone and Fonda lines.

5. The Des Moines Northern & Western Railroad Company, which acquired the property through a foreclosure of a mortgage given by its immediate predecessor.

The act of the Des Moines Northwestern Railway Company by which a conveyance of the ownership of the property was authorized, consisted in the resolutions from which we have just quoted.

These resolutions are supplemented by the resolutions of 1887 hereafter referred to.

If the purchase price provided for in these resolutions had been paid to the Northwestern Company and the conveyance authorized by this resolution made, no question could arise.

The thing actually done was this: Polk & Hubbell made a contract with the purchasing committee of the Wabash Railroad Company, which owned the Des Moines Northwestern bonds, by which the purchasing committee agreed to sell to Polk & Hubbell the Des Moines Northwestern Road extending northwesterly from Farnham street, and a one-fourth interest in the terminal property; title to be secured by a foreclosure of the Des Moines Northwestern line mortgage. By this contract, however, the purchasing committee retained the option of delivering to Polk & Hubbell one-fourth of the stock and bonds which it might receive from the terminal company in payment for the one-fourth interest in the terminal property, in lieu of conveying such interest in the terminal property.

This mortgage was foreclosed and Polk & Hubbell acquired the title to the Des Moines Northwestern Line through the foreclosure proceedings, and received from the purchasing committee one-fourth of the stock and bonds of the terminal company in lieu of one-fourth interest in the terminal property.

Polk & Hubbell transferred to the Des Moines & Northwestern Railway Company the Des Moines Northwestern or Fonda line, commencing at Farnham street, and one-fourth of the stock and bonds of the terminal company which they had received in lieu of an interest in the terminal property.

In this way the grantee of the Des Moines Northwestern Company received the purchase price for the former's interest in the terminal property, in lieu of receiving an interest in the terminal property itself.

As heretofore noted, there appears in the Milwaukee's chain of title the decree of foreclosure of the mortgage given by the Des Moines Northern & Western Railway Company, and the deeds executed in pursuance thereof. The Milwaukee Company have no rights which were not included in this foreclosure and these deeds. The mortgage referred to covered only the railroad property extending northwesterly from Farnham street, and the only interest ever possessed by the Des Moines Northwestern Company in the terminal property at Des Moines covered by this mortgage under which the Milwaukee holds was the interest represented by the stock acquired by Polk & Hubbell pursuant to their agreement with the Wabash purchasing committee.

Very clearly every right of the Des Moines Northwestern had thus been transferred to Polk & Hubbell, and that transfer was in the form of a transfer of the

consideration which was to be paid for the interest in the terminal property. There was no occasion for any direct conveyance by any one, of the interest of the Des Moines Northwestern in the terminal property, because no interest in that company appeared of record.

After the adoption of this resolution another one was offered and adopted which reads as follows:

"Resolved, That the proper officers of the company be authorized to transfer the management and operation of its property in Des Moines, so far as the same may now be vested in the company to the Des Moines Union Railway Company on the 1st day of January, 1885, or as soon thereafter as practicable, leaving the question of settlement between this company and the Des Moines Union Railway Company as authorized under the resolution for that purpose heretofore this day adopted to be arranged as directed therein." Vol. II, p. 427.

Taking these resolutions as a whole, it will be noted that there were two subjects covered by them—first, a sale and transfer of this property to the Des Moines Union Railway Company and the payment by that company in bonds and stock, the amount of which, so far as the bonds were concerned, could only be ascertained by an accounting between the companies. This would necessarily take some time. It was desired that the management of the property should be turned over to the defendant company at once, the reason being, we assume, that the impracticability of operating it in the manner in which it had theretofore been operated was pressing upon the parties. The last resolution pro-

vided for an immediate transfer of the possession, control and operation of the property, leaving the settlement between the parties, as authorized in the prior resolution, for future adjustment. Thus, as we have said, two objects were intended:

First. The immediate surrender of the possession and operation of the property; and

Second. A transfer of the ownership thereof and a settlement of the purchase price.

The same identical resolutions were on the same day passed by the stockholders of the St. Louis, Des Moines & Northern Railway Company (Vol. IV, pp. 1473-4), and by the stockholders of the Des Moines & St. Louis Railroad Company (Vol. II, pp. 430-2).

The only difference between the situation of the Des Moines Northwestern Company and the situation of the St. Louis, Des Moines & Northern and the Des Moines & St. Louis companies was that the title to a small portion of the terminal property stood in the name of each of the latter two companies, so that they not only owned the beneficial interest in the terminal property, in accordance with the contract of January 2, 1882, but they also held the legal title to a small portion of it.

The resolutions passed by the two latter companies authorized the transfer of not only the property to which these companies had the legal title, but also all their right, title and interest of whatever kind and character in the whole terminal, whether it stood in their names or the names of others. The effect of this was to authorize the transfer of the *ownership* of the property.

Supposing these resolutions had been immediately carried out and these railway companies had executed the deeds authorized: the effect would necessarily have been to have given to the defendant company the beneficial ownership of the whole terminal, but the legal title to only that portion of it which stood in the name of the St. Louis, Des Moines & Northern and the Des Moines & St. Louis companies.

On the same day the board of directors of the defendant, Des Moines Union Railway Company, held a meeting, a record of which appears on pages 432 to 435 of volume II. At this meeting certain resolutions were passed with respect to the subject matter under consideration.

The first paragraph of the resolution is as follows:

“Whereas, the Des Moines & St. Louis Railroad Company, the St. Louis, Des Moines & Northern Railway Company, the Des Moines Northwestern Railway Company, G. M. Dodge and James F. How, both in his individual right and as trustee under the contract mentioned and set out in the Articles of Incorporation of this company, have by their officers and by themselves, personally notified this company that they have each for themselves approved of the organization of this company, and have directed their officers, agents and trustees to surrender and deliver to this company the railroad property and franchises mentioned in said contract, and requested it to take possession of, and maintain and operate the same for the purposes and on the terms mentioned in said contract, and that said railway companies and individual signatories have indicated their desire and purpose to transfer said property to this company in accordance with the terms of said contract.”

This is the only intimation in the evidence that the trustees, How and Dodge, were at this time authorized to transfer any of this property.

The resolution then continues:

“Whereas, it is desirable that this company should at once take possession of said property and maintain, control and operate the same, and that it should procure all necessary conveyances and transfers of the same as soon as practicable, and make provisions for and pay for said property so proposed to be conveyed to it, Now, Therefore, be it Resolved,”

It will be noted that the recitation last above set out, like the resolutions of the three railway companies, includes two propositions:

First. The immediate possession, maintenance, control and operation of the property; and

Second. Procuring all conveyances and transfers of the same and making provision for the payment of said property.

The resolution then continues:

“First.

That this company accepts the transfer and management and operation of said property in the City of Des Moines, east of Farnham street in said city, heretofore owned and controlled by the Des Moines & St. Louis Railroad, Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, and the several others, parties to said contract, and assumes control thereof from this date, so far as

practicable, and it hereby instructs its president to make such order as may be necessary to render such control and management effective, as provided in said contract."

It will be noted that this portion of the resolution does not say anything about the purchase or conveyance of the property, but only treats of the question of the immediate possession, control and management.

The resolution then continues as follows:

"Second.

"That the President, Vice President, Secretary and Treasurer of this company be, and they are hereby appointed a committee to confer with the several parties to said contract and agree with them severally upon the *terms and price at which they will respectively assign, transfer and convey said railroad property and franchises to this company, and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this company with the title, control and management of said properties provided for in said contract of January 2, 1882.*"

This portion of the resolution treats exclusively of the purchase of the property. It authorizes this committee to agree upon the terms and price at which the property is to be transferred and conveyed, and to procure the necessary conveyances and transfers to *fully* invest the defendant company with the *title, control and management of the property.* This is apt language to express the intention of the defendant company to acquire the ownership of this property, and there is nothing in it to suggest that it was contemplated that

the three railway companies were to retain any interest in the property, or that defendant was to pay merely for the privilege of holding the naked legal title.

The resolution then continues:

“Third.

That to enable this company to pay for the property and to maintain, operate and improve the same, and *purchase* other property necessary to carry out its objects, and remove any and all liens or incumbrances thereon, and pay off all just claims against the same, the President and Secretary of this company are hereby authorized and directed to issue full-paid capital stock of this company, not to exceed one million (\$1,000,000.00) dollars and not to exceed five hundred (500) bonds of this company, of the denomination of one thousand dollars (\$1,000.00); the form to be agreed upon hereafter by this board.

And to secure said bonds, the President and Secretary are authorized and directed to execute, in the name of this company, a first mortgage or deed of trust, conveying all of said property so to be conveyed to this company or thereafter to be acquired, to a trustee therein named, the form of which deed of trust shall be hereafter determined by this board.

And when said committee shall have agreed with the said several parties to said contract as to the amount of bonds and stocks of this company necessary to be delivered to them, and each of them, in payment for said railroad property and franchises, the President and Secretary of this company shall deliver the same to said several parties as each appear to be entitled, on receipt of the conveyances and assignments of said property so to be made to this company.”

Thus we find the defendant company arranging on its own account to raise the funds necessary to pay for the property and to improve the same and acquire other property necessary to carry out the objects of the defendant company, and authorizing the payment for said property upon the execution of the necessary conveyances. The intention of these three railway companies, which, according to complainants' theory, owned this property, to transfer the same in fee simple to the defendant company, and the intention of the defendant company to acquire the ownership thereof, could not be more clearly expressed than by the language used in these various resolutions, and these resolutions simply carry out the thought expressed in the articles of incorporation of the Des Moines Union Railway Company.

No action was immediately taken under these resolutions, probably because about this time the affairs of the Wabash Company were placed in the hands of a receiver and its property transferred to what is known in this record as the Purchasing Committee.

These resolutions, however, remained unrepealed until they were carried out by certain deeds executed by them to the defendant company in the early part of the year 1888, to which we will hereafter call attention.

The subject of the sale and transfer of this property to the defendant company came up at meetings of the directors of the three railroad companies, held on November 5 and 8, 1887, but before considering the action of these various companies at that date, we think it is well to call the court's attention to the mortgage or trust deed which was subsequently given by the defendant company to the Central Trust Company of New York, to secure an issue of bonds, a portion of

which bonds was subsequently delivered to the persons and corporations who had furnished the money for the purpose of acquiring and improving the terminal property. This mortgage appears commencing on page 459 of volume II, and is dated November 1, 1887. It was drawn by Col. Wells H. Blodgett, general counsel for the Wabash Company, one of the most able and conscientious lawyers who ever practiced in this court, and who was apt, as this record again and again shows, in selecting language which accurately conveyed the intention of the parties.

This mortgage, as it will be noted, was prepared before the resolutions of November, 1887, to which we have just referred, and before any transfer of the property was made, and expresses the understanding of Colonel Blodgett, as he looked into the future, of what was intended to be done with this property.

After reciting the date and the parties to the contract, the mortgage provides (p. 460):

'Whereas: The Des Moines Union Railway Company is a corporation duly organized and existing under the laws of the State of Iowa, and as such is fully authorized to *locate, construct, own and operate* a railway in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of depots, freight houses, railway shops, repair shops, stock yards and whatever may be useful and convenient for the operation of railways in said city, and the transfer of cars from the lines and depots of one railway to another, and from said depots to the various manufacturers, warehouses, storehouses or elevators, and from one manufactory, warehouse, storehouse or elevator to another, as said depots, manufacturers, warehouses, storehouses and elevators are

now constructed or may be hereafter constructed in or around the said City of Des Moines, Iowa, and for such purposes has full right to acquire by purchase and condemnation all such right of way, land and lots as are necessary and proper for the operation and construction of such line of railroad, and to provide itself with depot grounds, yards, shops and other terminal facilities adequate for handling of traffic to be transported upon such railroad, and"

If you will compare this recitation with the articles of incorporation of the Des Moines Union Railway Company, you will at once conclude that when Colonel Blodgett dictated this paragraph he had before him the articles of incorporation of the Des Moines Union Railway Company, and from them ascertained just the powers and purposes of that company.

Colonel Blodgett understood that this corporation was organized, not as a mere depot company for the mere purpose of holding the legal title to this property for the benefit of any one, but for the purpose of constructing, owning and operating a railway in the City of Des Moines.

The mortgage then continues:

"Whereas, the Des Moines Union Railway Company has undertaken and partially completed the construction of a railroad in the City of Des Moines, Polk County, Iowa, extending from the main lines of the Des Moines & St. Louis Railway Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company to a connection with and across the line of various other railroads which center or terminate in the City of Des Moines, and to various manufactories and industries in said

city, and has purchased and owns various structures and buildings used for depots, railway shops, round houses and other structures suitable and useful for railway purposes, and has purchased, acquired and owns by condemnation and otherwise, valuable real estate in said city, and valuable franchises from the City Council of said city, and"

Now the Des Moines Union Railway Company at this time hadn't undertaken and partially completed any railroad in the City of Des Moines or elsewhere. It hadn't purchased, acquired or owned, by condemnation or otherwise, any valuable real estate or franchises in the City of Des Moines or elsewhere. Up to this time it was simply a corporation which had been organized for the purpose of acquiring and owning these things, but Colonel Blodgett in drawing this particular paragraph was looking into the future and planning for doing the things which were afterward done and which gave to the Des Moines Union Railway Company the ownership of the very property to which reference is made in this mortgage. Nothing could more clearly show the intention of these parties than the language incorporated in this mortgage by the person who was furnishing the legal service necessary to carry out the objects of the persons and corporations engaged in this transaction. This wasn't a construction of what had been done, but an expression of what was intended to be done and what was in fact afterward done.

The mortgage then continues:

"Whereas, for the purpose of paying for the property aforesaid, aiding in the construction and extension of said railway, perfecting the title to said property, and completing all necessary and

desirable improvements thereto and thereon, said party of the first part proposes to issue its bonds to the amount of eight hundred thousand (\$800,000) dollars, to be dated on the 1st day of November, 1887, in accordance with the resolutions and orders of its Board of Directors at a duly called and authorized meeting thereof;"

The mortgage then proceeds by its terms to convey to the Central Trust Company the very property which was afterward transferred to the defendant company by appropriate deeds from the three railway companies.

Let us now examine the record and see whether or not the purposes so aptly expressed by Colonel Blodgett in this mortgage were carried out, and for that purpose we wish to call the court's attention to the resolutions of these railway companies passed in November, 1887—a few days after the date of the mortgage in question.

Before doing so, however, we wish again to remind the court that the resolutions already referred to and passed by these railway companies in 1885, authorized not the transfer of the legal title to this property by the trustees, but the transfer of the beneficial interests by the railway companies. In carrying out the plan which is evidenced by the mortgage above referred to, it no doubt came to the attention of the parties that the resolutions of 1884 were defective in that they did not authorize a transfer by the trustees, which was necessary to give to the defendant a perfect title to the property, and therefore the resolutions now referred to were passed by the railway companies.

The resolutions of the St. Louis, Des Moines & Northern Railway Company will be found on pages 435 and

436 of volume II. They recite the fact that James F. How had acquired the title to certain property in the City of Des Moines with money furnished by the Wabash Company; that by an agreement between this company and the Wabash Company and others, it was intended that the said property should be transferred to the Des Moines Union Railway Company; and they then authorize Mr. How to transfer said property to the Des Moines Union Railway Company upon receiving from said company a stipulation that as soon as practicable thereafter the defendant railway company shall deliver to him first mortgage bonds to the amount of money advanced for the payment of said property and improvements, with interest and taxes paid thereon, and also three-fourths of the stock of the Des Moines Union Railway Company, the said bonds and stock when received to be transferred by How to the Purchasing Committee of the Wabash Company. They also recite the fact that Grenville M. Dodge had purchased certain property as trustee, and the fact that in accordance with the contract above mentioned it was intended that said property should be transferred to the Des Moines Union Railway Company; and they then direct General Dodge to transfer said property to the Des Moines Union Railway Company upon receiving from said company a stipulation that as soon as practicable the railway company should deliver him bonds for the amount of money he had advanced in payment for the terminal property and improvements, interest and taxes, and also one-fourth of the capital stock of the Des Moines Union Railway Company.

In explanation of the fact that the Purchasing Committee was to receive three-fourths of the capital stock of the Des Moines Union Railway Company, it may be

noted that at this time the Purchasing Committee were entitled, in equity at least, to whatever was coming to the Des Moines & St. Louis Railroad Company and the Des Moines Northwestern Railway Company; and General Dodge was entitled to whatever was coming to the St. Louis, Des Moines & Northern Railway Company.

Similar resolutions were passed by the directors of the Des Moines & St. Louis Railroad Company (vol. II, pp. 437-9). There were present at the meeting of the Des Moines & St. Louis Company, among others, James F. How, Vice-President of the Wabash Company, and Col. Wells H. Blodgett, general counsel for the Wabash Company and the Purchasing Committee.

In addition to the resolutions similar to those passed by the St. Louis, Des Moines & Northern, the Des Moines & St. Louis Company passed the following resolution, which was offered by James F. How (vol. II, p. 439) :

“Resolved, that the President and Secretary of this company, be and they are hereby authorized and directed to execute to the Des Moines Union Railway Company a deed conveying to it all its real estate rights of way, franchise, road bed and other property of said company lying and being in the City of Des Moines, east of Farnham Street, whether the same was acquired by grant from City of Des Moines or by purchase or condemnation, this resolution being offered for the purpose of carrying out the contract of date January second, 1882, entered into by and between this company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company and others.”

Thus again authorizing a transfeſr by the Des Moines & St. Louis Railroad Company of its beneficial inter-

est in the property which stood in the name of the trustees.

The record does not show the resolutions themselves that were passed at the time by the Des Moines Northwestern Railay Company, but the complainants offered in evidence a notice served by the Des Moines Northwestern Railway Company on the Des Moines Union Railway Company at this time, notifying the latter company that it had passed similar resolutions. This appears as plaintiffs' exhibit 15, page 442, volume II.

We therefore find in the record resolutions of the three railway companies, which, the complainants admit, were the real owners of this property, authorizing a transfer of the property both by these corporations and the trustees, in consideration of the defendants' captial stock and bonds, the latter representing the amount actually invested in the purchase and improvement of the property, with interest and taxes thereon.

In pursuance of these resolutions, James F. How executed and delivered to the Des Moines Union Railway Company three deeds, and G. M. Dodge and wife one deed, which appear in volume II, pages 446 to 454. The St. Louis, Des Moines & Northern Railway Company and the Des Moines & St. Louis Railroad Company each executed a deed to the Des Moines Union Railway Company, which deeds appear on pages 455 to 459 of volume II. These deeds were prepared or approved by Colonel Blodgett.

On January 31, 1888, James F. How, Vice-President of the Wabash, wrote to J. S. Polk, of Des Moines, Iowa, enclosing what he refers to as "deeds from General Dodge to the Des Moines Union Railway Com-

pany," which he says, "Colonel Blodgett has examined and pronounces all right" (vol. IV, p. 1587).

On the next day, Mr. Polk writes to Mr. How, saying:

"Your letter of the 31st ult. enclosing two deeds, one from the St. Louis, Des Moines & Northern, and the other from G. M. Dodge, to the Des Moines Union Railway Company for certain property in Des Moines is received.

We delivered to General Dodge the contract of the Des Moines Union Railway Company, to give him the bonds, and stock of the company when the same are issued, in payment for said terminals. If the deeds are satisfactory to you we will put them on record at once." (Vol. IV, pp. 1587-8.)

On February 13, 1888, Mr. How wrote to Mr. Polk as follows:

"Enclosed please find a deed from the Des Moines & St. Louis Ry. Co. to the Des Moines Union Ry. Co. for the property owned by the former Co. in Des Moines. Please have same executed by Mr. Clarkson as President, and by Mr. Hubbell as Secretary and return same to me as Mr. Blodgett wishes to see that it is properly executed before it is put on record.

I understand that the Des Moines Northwestern Ry. make no deed as they have no property in Des Moines to transfer. Am I correct about this? If not, I would like to see their deed before it is recorded." (Vol. IV, p. 1588.)

On February 21, 1888, Mr. Polk replied:

"I herewith enclose deed from the Des Moines & St. Louis Railroad Company to the Des Moines Union Railway Company, which you forwarded to

us for execution. The same has been signed by Mr. Clarkson, and Mr. Hubbell, and properly acknowledged. Hope you will find it all satisfactory." (Vol. IV, pp. 1589-90.)

The deed from the St. Louis, Des Moines & Northern Railway Company appears on pages 455 and 456 of volume II, and after describing the particular pieces of property which stood on the record in the name of the St. Louis, Des Moines & Northern Railway Company, the deed continues:

"* * * Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possesison, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To Have and to Hold all and singuar the above mentioned and described premises together with the appurtenances, unto the said parties of the second part and assigns forever."

The property which was transferred by this deed was a part of the terminal property. It is the theory of petitioners that the St. Louis, Des Moines & Northern Railway Company retained some interest in the property itself. In view of this contention, we would like to inquire what possible interest, easement or equity the St. Louis, Des Moines & Northern Railway Company could have had in this property that was not transferred by the terms of this deed. We are unable

to formulate or conceive of more apt and complete language to transfer every possible interest in real estate. This deed not only transferred the legal title, but whatever equity, right or easement the grantor had in the property. It clearly shows the intention to give to the Des Moines Union Railway Company a perfect title to the property.

When we come to examine the deed of the Des Moines & St. Louis Railroad Company to the Des Moines Union Railway Company, we think there can be no question about it. It will be remembered that while, under the contract of 1882, the Des Moines & St. Louis Company owned a half interest in the terminal property, the title to only a small portion of it stood in its name. This deed, after describing the property which stood in its name, continues as follows (p. 458):

*** * * And all of the real estate within the City of Des Moines, Iowa, which is the property of the grantor, together with all real estate which may hereafter be acquired by this grantor either by condemnation proceedings or otherwise. Also all its embankments, bridges, turnouts, side-tracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turntables and all its railroad property acquired and to be acquired, and everything appurtenant to said railroad, and all franchises and rights it may have acquired by grant, donation, purchase or otherwise, and particularly all rights, franchises and privileges granted by the City of Des Moines, Iowa, under an ordinance 'granting the right of way to the Des Moines and St. Louis Railroad Company and its assigns, over, across, along and upon certain streets and alleys in the City of Des Moines, Iowa, and the right to bridge the Des Moines River on the south alley in said city be-

tween Court Avenue and Vine Streets.' And the said Des Moines and St. Louis Railroad Company hereby covenants to Warrant and Defend the said premises against all the lawful claims of all persons whomsoever, claiming by, through or under it. Signed this 21st day of February, A. D. 1888."

What more appropriate language could have been selected to transfer to the Des Moines Union Railway Company not only the property specifically described in said deed, but all the railroad property which the grantor had in the City of Des Moines, and which, according to the theory of petitioners was a half interest in the property which stood in the name of How and Dodge? Note, also, that the Des Moines & St. Louis Railroad Company covenants to warrant and defend the premises against the lawful claims of all persons whomsoever, claiming by, through or under it. The plaintiff, the Wabash Railway Company, claims under it (the Des Moines & St. Louis Company).

The Des Moines Northwestern Railway Company did not make a deed because there was no property standing in its name. It had, however, as we have shown, authorized a transfer of all its interest in this terminal property, and it or its successors received the purchase price agreed upon, as we will hereafter show. Also, the St. Louis, Des Moines & Northern Railway Company or its successors, as well as the Des Moines & St. Louis Company or its successors, received the consideration.

These deeds were put upon record soon after their execution, and on May 1, 1888, the Des Moines Union Railway Company took possession of the terminal property and has ever since possessed and operated it.

The mortgage of the terminal property, which was prepared in November, 1887, before the actual transfer of the property to the Terminal Company, was now, after the transfer had been completed, executed and placed of record. The bonds secured by it were negotiable in form and were designed to be sold in the open market. Had there ensued a default and foreclosure what estate would have passed to the purchaser at the foreclosure sale? Certainly nothing less than an absolute estate. But it could not have been more than passed to the Terminal Company. And if that Company got only the legal title in trust, if the entire beneficial interest remained in the three railway companies, and that interest was inalienable, then the bonds and mortgage were nothing more than counters in a scheme of fraud. The right, title and interest of the Des Moines Union in this property, from the time it got it until now was what it was, when it made this mortgage. True it could not, under its articles of incorporation, encumber this property without the approval of the three railway companies, its stockholders, but this restriction upon the mode of its corporate action did not qualify its estate in its property. The railway companies approved the mortgage as required, but they did not extend its scope to their own property. They simply did "ratify and approve the execution of the mortgage to the Central Trust Company by the Des Moines Union Railway Company upon all *its* property and franchises to secure the issuance, etc." (R. 474.)

We claim that by reason of the facts hereinbefore referred to—the articles of incorporation of the terminal company, the resolutions of the three railway companies proposing to sell the property to the terminal company, the resolutions of the terminal company

accepting this proposition, the execution and delivery of the deeds to the property, the payment of the purchase price to the parties entitled thereto, the taking possession of the property by the terminal company—the terminal company became the absolute owners of the terminal property, and that the ownership of the three railway companies in the terminal property was changed to the ownership of the capital stock of the terminal company.

THE CONTRACT OF MAY 10, 1889, AS BEARING UPON THE INTENTION OF THE PARTIES.

If there can now be any doubt who owned this property after May 1, 1888, let us see what the parties themselves had to say about it after the consummation of the transaction, because if they thought that the Des Moines Union Railway Company then owned this property, there is no occasion for the court to inquire further into it. Fortunately we have in the record the undisputed agreements of these parties with reference to the title, in a contract which was introduced by the complainants.

For some reason or other, counsel for complainants have never seemed to understand just what we claim for the contract of May 10, 1889, as applied to this branch of our case. Counsel for the Milwaukee, on page 59 of the Court of Appeals brief, says:

“it is the contention of the defendants that this contract of May 10, 1889, killed that of 1882, and terminated all rights of the Railway Companies to use the property after May 1, 1918, because the supplemental contract covers a period of time up to that date only.”

And counsel for the Wabash Company, on page 131, Court of Appeals brief, says:

"Defendants have contended that by the execution of the contract of 1889 the Railway Companies intended to rest their right to use the terminal property on the provisions of that contract, and are by that contract estopped from asserting a claim to the terminal property adverse to the depot company, and have argued that the Railway Companies thereby released any claim to an easement in the terminal property."

Neither of these statements correctly states our position with relation to this contract. Our position is, *first*, that it having been deliberately prepared, considered, and executed by the parties, and approved by the formal action of their boards of directors, is of the highest value—of the greatest probative force—because of its interpretation of the intention of the parties by their prior transactions.

Second: It is of importance when we come to consider the defense of estoppel and laches, which we will hereafter discuss.

The title and ownership of this property were not transferred to the terminal company by reason of the contract of May 10, 1889, but by reason of the things that had gone before and to which we have referred.

Upon taking possession of the property by the defendant company, the question of the terms upon which the defendant should furnish to these railway companies terminal services became a subject of negotiation, which resulted in a written contract, dated May 10, 1889, between the defendant company as party of the first part, and the Des Moines & St. Louis Railroad

Company, the Des Moines & Northwestern Railway Company (successor of the Des Moines Northwestern Railway Company), and the St. Louis, Des Moines & Northern Railway Company, parties of the second part, which contract appears commencing on page 479 of volume II. This contract was drawn by Colonel Blodgett, general counsel of The Wabash Railroad Company and the Des Moines & St. Louis Railroad Company, who had guided these transactions and who knew the situation and what was intended by the parties. We therefore not only have the written statement of the interested parties as to the title to this property, so far as it is contained in this contract, but we have such written statement in the language of one who knew how to select words apt for the purpose of expressing his understanding.

The contract, after reciting the date and the parties to it, says:

"Whereas, the said party of the first part (Des Moines Union Railway Company) is the owner of valuable terminal facilities in the City of Des Moines, Iowa, as hereinafter described; and"

Now neither Colonel Blodgett nor the parties to this contract, who were the only ones interested in it, had any doubt at this time as to who the owner of the property was. They agree that it was the defendant, the Des Moines Union Railway Company.

The contract then says:

"Whereas, the respective parties of the second part have railroads in the State of Iowa which terminate at, or run into and through said City of Des Moines, and in order to prevent unnecessary

expense, inconvenience and loss attending the accumulation of a number of stations, and in order to facilitate the public convenience and safety, it has become important that said second parties should have the use of the *terminal facilities of said first party; and*"

Again we have the agreed statement of these parties that the ownership was in the defendant.

The contract continues:

"Whereas, said party of the first part has become incorporated and organized under the laws of the State of Iowa for the purpose of *owning and operating* a line of railway in the said City of Des Moines, Iowa, extending from the eastern boundary line of said city to Farnham Street, in the western part thereof; and"

There is no pretense here that the defendant corporation was organized for the purpose of acting as trustee or holding the naked legal title to this property, but on the contrary these parties agree that it was organized for the specific purpose of owning and operating this terminal property—something never contemplated in the contract of January 2, 1882.

The contract then continues:

"Whereas, said party of the first part, in pursuance of said charter has *acquired* and now *owns* a railway in said city, as above set forth, and has *already acquired* or *constructed* a large number of valuable main and side tracks, depots, depot grounds, lands, yards, shops, round houses, freight houses and other terminal facilities, and *intends to acquire and construct more; and*"

This is the language selected by Colonel Blodgett and adopted by all the parties interested, to state the result of the transactions which we have been heretofore considering.

The contract then continues:

"Whereas, said second parties are each desirous of having the right to use said terminals in connection with their respective railroads; and"

Why, let us inquire, were each of the parties of the second part desirous of acquiring by contract the right to use these terminals if they already had that right, as is claimed by counsel for petitioners?

The contract then continues:

"Whereas, for the protection of the parties hereto and their assigns, it is important that the rights, duties, and liabilities of each in regard to the whole subject-matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance, and repairs, shall be stated and defined.

Now, therefore, in consideration of the premises, it is mutually agreed by and between said party of the first part and each of the several parties of the second part (each of said second parties contracting for itself), as follows."

The contract then provides what the defendant company shall do in respect to acquiring further terminal property, improvements thereon, and the amounts which the tenant companies are to pay for the use of the property, and then provides that in consideration thereof the defendant company grants to the said second parties the use of the terminal property.

The contract goes into considerable detail as to how the property is to be managed, etc., not necessary here to refer to; provides how the capital stock of the defendant company shall be distributed among the three railway companies, and then says (section 27, p. 487):

"Whereas, the parties of the second part have herein and hereby obligated themselves to pay as a part of the compensation for the use of said premises a sum sufficient to pay the interest on the whole number of bonds issued and used, or to be hereafter issued and used by said first party in purchasing, improving and equipping the terminal properties herein described;

Now, therefore, in consideration of the premises, the said first party hereby contracts and agrees to and with each of the second parties hereto, that it will not at any time hereafter issue or dispose of any of said bonds, except for the purpose of purchasing with them or their proceeds additional terminal property, or for improving or equipping that now owned by it in said City of Des Moines."

Note that the reason given in the contract for limiting the right of the defendant company to issue its bonds is that the parties of the second part had agreed to pay the interest on the bonds. If the parties of the second part thought they were the real owners of this property, they would have been interested in the principal of these bonds rather than in the interest on them. They were not interested in the principal because they were not the owners of the property, and their only obligation with respect to the bonds was the contract obligation to pay the interest.

Another significant thing about this contract is the provisions therein contained with respect to the sale and transfer of the capital stock of the terminal com-

pany and the assignment of the rights of either of the three railway companies acquired by the terms of the contract.

It will be remembered that the articles of incorporation of the terminal company placed no restriction on the right of its stockholders to sell and transfer its capital stock, or any part thereof, the result being that any stockholder might freely sell and transfer any portion of his stock. The three railway companies having intended to control the management and operation of the terminal property, the reason for their desiring to in some way limit the right to transfer this stock is apparent. It was therefore provided in section 24 of the contract (p. 485) as follows:

‘It is understood and agreed that the Des Moines & St. Louis Railroad Company, as the owner of one-half of the capital stock of the Des Moines Union Railway Company, may sell and transfer one-half of said stock, or one-quarter of the whole to such railway company as may be acceptable to a majority of the parties of the second part; in which case it is agreed that said railway company which may become the purchaser of said stock, may be admitted as one of the parties hereto, of the second part, upon the same terms and conditions as those stipulated for the other parties of the second part.’”

It is now contended by petitioners that the terminal company was a “mere agency” for the railway companies, having no valuable interest in the terminal property, and therefore that the stock was “merely nominal and of nominal value.” because it represented no valuable interest in the property. If this theory be true, what would any railway company have received

in consideration for the money paid for one-half of the terminal stock owned by the Des Moines & St. Louis Company? Merely the right to become a party of the second part to the contract of May 10, 1889, and the possession and ownership of some nicely lithographed pieces of paper. Its rights under the contract of May 10, 1889, would have expired at the end of thirty years from that date. As the owner of the stock, it would have had no rights because, as counsel claim, that didn't represent anything of value.

To illustrate: The record shows that negotiations were subsequently entered into to sell this stock to the Chicago & North Western Railway Company and secure the entrance of that company on the terminal property. Supposing these negotiations had been successful and after the North Western Company had paid its money for this stock it had been told that this stock didn't represent anything of value and that the only right it gave was the right to become a party of the second part to this contract and the privilege of paying its share of the expenses during the existence of such contract; would the North Western Company have felt that it had been fairly dealt with?

We do not think the persons who were instrumental in these transactions and who conducted these negotiations had any such purpose in their mind, nor can we bring ourselves to think that the Purchasing Committee of the Wabash Company and the others who had relations with the subsequent sale of the stock of the terminal company to the Hubbells, which included Colonel Blodgett, James F. How, Charles M. Hays, and others, had in their minds any purpose of swindling Mr. Hubbell and General Dodge when they sold them stock in the terminal company.

It is apparent from these provisions in the contract, as well as the provisions of section 26 (p. 486), which related to a sale and transfer of stock, that the parties understood that this stock represented a valuable interest in the terminal property.

Again, by section 25 of the contract (p. 486), it was attempted to control the right of each of the three railway companies to assign and transfer the rights which they obtained under the terms of the contract. If we are to believe the present theory of counsel for petitioners the three railway companies didn't obtain any rights under this contract, notwithstanding the fact that the contract purports to grant them rights, because they say that the contract was merely a formality, that it was really an arrangement between the three railway companies to regulate, as between them, the use of the property. But it seems to us that this theory is too absurd to warrant further discussion.

That the present theory of petitioners with relation to their rights in the terminal property never occurred to anyone until the commencement of this suit is demonstrated by the fact that the three railway companies and their successors at all times thereafter, when transferring or mortgaging their interest or rights in the terminal property, described them as their rights acquired under the contract of May 10, 1889, and the contract of July 31, 1897 (the ratification contract), and the capital stock of the terminal company owned by them. And this is particularly true of the mortgage of The Wabash Company executed in 1889 under the guidance of Colonel Blodgett, to which more particular reference will hereafter be made.

What better evidence could we ask of ownership of this property than the contract or statement signed by

all the parties immediately or soon after the transaction by which the property was transferred to the defendant company, and a statement drawn by one who not only knew what the understanding was, because he had been a party to the transactions, but who had the capacity to accurately state it?

The contract of January 2, 1882, according to its language, contemplated that the terminal property should be owned by the three railway companies, though the title should stand in the name of a trustee, which might or might not be a corporation. Now what have we up to this point which evidences the fact that these three railway companies intended to and did change their plans from an ownership by the three railway companies, to an ownership by an independent corporation. Briefly stated, the facts are as follows:

1. The organization of a corporation at the instance of these three railway companies for the purpose of, and with the power to, own and operate a terminal railway in the City of Des Moines, Iowa, and with the express power of acquiring by purchase the ownership of the particular terminal in question. This corporation was the defendant, the Des Moines Union Railway Company.
2. The intention expressed prior to the transfer of the ownership of the property, that the Des Moines Union Railway Company should acquire the title to the property. This intention was expressed by the mortgage prepared by Colonel Blodgett on November 1, 1887, from the Des Moines Union Railway Company to the Central Trust Company, and afterward executed by the terminal company.

3. The resolutions of the three railway companies and of the terminal company passed in January, 1885, and November, 1887. These resolutions authorized the transfer of the ownership of the terminal property in consideration of its stock and bonds.

4. The deeds executed and delivered to the Des Moines Union Railway Company in 1888, by the terms of which every possible interest which the parties had in the property was transferred.

5. The payment of the agreed purchase price and delivery of the property.

6. The written statement prepared by Colonel Blodgett and executed by all the parties interested in the property, reciting the fact that the Des Moines Union Railway Company had by these transactions acquired the ownership of the property. This written statement was contained in the written contract of May 10, 1889.

This evidence is not the oral evidence of witnesses who attempt to state their recollections of transactions happening a quarter of a century prior to the time of the giving of their evidence, but consists of the solemn and formally executed instruments at the time the transactions occurred and about which there is no controversy.

If there is, however, any lingering doubt in the mind of the court as to the effect of the transaction in which this property was transferred to the defendant company, let us examine a transaction which occurred in the early part of the year 1890—less than two years after the property was delivered to the defendant company, and in which the actors were the same persons who had been active in the management of not only

the terminal property, but of the interests of the other railroads therein from the very beginning, and who, if anybody, knew and appreciated the situation. This transaction was the amendment to the articles of incorporation of the defendant company which was consummated on April 8, 1890.

AMENDMENTS TO ARTICLES OF INCORPORATION OF DES MOINES UNION RAILWAY COMPANY.

The complainants challenge the validity and effect of those amendments—a subject which we will discuss in a subsequent division of our brief—but for the present we are only inquiring as to the intention of the parties to the transaction by which this property was transferred to the defendant company, and for the present we will only consider the record in respect to these amendments for that purpose.

These amendments were adopted at an adjourned meeting of the stockholders of the Des Moines Union Railway Company held on April 8, 1890. A record of that meeting appears in volume II, commencing on page 488. There were present, among others, James F. How, Vice-President of the Wabash Company, and who had been intimately connected with this terminal transaction as a representative of the Wabash Company since its inception; C. M. Hays, who was general manager of the Wabash Company and had been with that company since 1883; A. B. Cummins, who was local attorney for the Wabash Company in Des Moines and represented it on the board of directors of the defendant company, and who was also general counsel for the defendant company. G. M. Dodge and Wells

H. Blodgett were both present by proxy, the former being represented by L. M. Martin, and the latter by J. F. How. Both General Dodge and Colonel Blodgett signed and acknowledged the amendment to the articles after they were authorized. There were also present F. M. Hubbell, L. M. Martin and F. C. Hubbell, all of whom had been familiar with the terminal proposition either from the beginning or during its early stages. These parties knew what was intended by the transactions under consideration, and they were all honorable, able and upright men.

After the organization of the meeting, C. M. Hays moved that article 2 of the original articles be stricken out and that there be enacted in lieu thereof the following (p. 490):

“Article 2.

The object of the corporation and the general nature of the business to be transacted shall be the purchase, lease, construction, ownership, maintenance and operation of a system of railway in, around and about the City of Des Moines, Polk County, Iowa, including the construction, purchase, ownership, maintenance and use of a union depot, depots, freight houses, railway shops, repair shops, stock yards and whatever other things may be useful or convenient for the operation of railways at terminal stations, as well as the transfer and switching of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, elevators or other sources of traffic to each other or to any of the railways or depots thereof, now constructed or hereafter to be constructed in or around said City of Des Moines, and also to lease terminal facilities to and furnish and perform terminal services for all railways whose lines reach or pass through or near the said

City of Des Moines, and the corporation shall possess all the power conferred upon railway corporations by the laws of the State of Iowa, including the power to condemn private property for its use."

This motion was adopted and thereby there was stricken out of the article all reference to the contract of January 2, 1882, and thereby the thought that it was intended that the defendant company should acquire absolute title to the property is corroborated.

L. M. Martin moved that article 3 be stricken out and the following enacted in lieu thereof (p. 490):

"Article 3.

'The capital stock of the corporation shall be two million dollars (\$2,000,000.00) which shall be divided into shares of one hundred dollars each; said shares shall be paid for and issued in the manner following and not otherwise; *four thousand shares as a part of the purchase price of the terminal property originally acquired by the corporation, it being now agreed by all the stockholders that said sum of four hundred thousand dollars, together with the first mortgage bonds theretofore issued for that purpose constituting the fair value of said property when so acquired;* and all resolutions and proceedings of the corporation heretofore had with respect to the amount of capital stock to be issued as such purchase price, are set aside and held for naught.

Said four thousand shares of capital stock shall be issued to the following corporations and in the following proportions:

Two thousand shares to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company, successor in ownership to the Des

Moines & St. Louis Railroad Company, and the present owner of the property known as the Des Moines & St. Louis Railroad.

One thousand shares to the Des Moines & Northwestern Railway Company, successor to the Des Moines Northwestern Railway Company, and

One thousand shares to the Des Moines & Northwestern Railway Company, successor to the St. Louis, Des Moines & Northern Railway Company, and the said shares are hereby declared to be fully paid by the transfer of the aforesaid property. The remaining capital stock, to-wit: sixteen thousand shares, or any part thereof, shall be issued only by the authority of a resolution of the stockholders adopted by the vote of more than seven-eighths of all the stock theretofore issued and shall be fully paid either in money or property at its fair market value, before certificates therefor shall be executed and delivered."

This resolution was unanimously adopted by all present and language could not be conceived more appropriate to express the thought that the defendant company had acquired an absolute title to this property in consideration of the bonds and stock issued.

In order to protect the companies in the control of the defendant company through their stockholding interest, article 4, as amended, provided that the affairs of the company should be managed by a board of eight directors, but that at all future elections of directors it shall require the vote of more than seven-eighths of all the stock theretofore issued, to elect any director. Thus no new directors can be elected without the unanimous consent of all stockholders holding five hundred or more shares of the capital stock. This article also provided that in all matters other than the ordinary

operation of the property, the board of directors can only act upon the unanimous vote of eight members thereof, and gives the power to each director to delegate by written authority some other person to vote for him. The other amendments to the articles are immaterial for the purposes for which we are now considering them, except article 15 (p. 494), which provides as follows:

"The proceedings of a meeting held December 10, 1884, with certain preambles, including a contract executed on the 2nd day of January, 1882, between the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, consented to by the Wabash, St. Louis & Pacific Railway Company, which now appears as part of the Articles of Incorporation of this Company, *are hereby repealed, stricken out and expunged.*"

It is interesting to note that the only reference to the contract of January 2, 1882, to be found in the record, from May 1, 1888, up to the time of the commencement of this suit (almost twenty years) is the reference found in the record of this meeting of April 8, 1890, when it was formally revoked.

The contract of January 2, 1882, could not, of course, be changed or abrogated by third parties. It was in that sense inviolate, but it was not any more than any other contract immutable and irrevocable by the unanimous agreement and action of the parties themselves. And here we have in these amendments to the articles of the Des Moines Union, an absolute revocation of the contract and the action making the revocation—the amendment to the articles—is not the

action of the Des Moines Union itself, but of its stock-holders, and they are the parties and all the parties (or successors in right and title), to the original contract.

In addition to adopting the amendment to the articles of incorporation and authorizing their filing and publication, the following resolution, offered by A. B. Cummins, was passed by a unanimous vote of all the directors present: (P. 494.)

"Whereas, by inadvertence, there appears to be some uncertainty in the records of the Company respecting the purchase price of the terminal property originally acquired by the company, and

Whereas, it was the agreement between all the parties in interest that said property, including the franchise incident thereto, should be purchased at its fair value, payable partly in first mortgage bonds and partly in capital stock fully paid up, and

Whereas, it was and is agreed that said property was fairly worth the sum of eight hundred sixty-one thousand two hundred and fifty-seven and 21-100 dollars, of which purchase price the Des Moines & St. Louis Railroad Company, the Wabash, St. Louis & Pacific Railway Company or its representative, the purchasing committee, the said purchasing committee being now the real owner of the Des Moines & St. Louis Railroad, together were and are entitled to four hundred and seventy thousand one hundred and ten and 80-100 dollars (\$470,110.80) of said purchase price, the Des Moines Northwestern Railway Company was entitled to two hundred and fifteen thousand and fifty-eight and 40-100 dollars (\$215,058.40) of said purchase price, the St. Louis, Des Moines & Northern Railway Company was entitled to one hundred thousand dollars (\$100,000.00) of said purchase price. G. M. Dodge to seventy-four thousand and eighty-eight and 01-100 dollars (\$74,088,-

01) of said purchase price and Polk & Hubbell to two thousand dollars (\$2,000.00) of said purchase price, and

Whereas, by a settlement heretofore had and now confirmed, it appeared that of such purchase price the purchasing committee of the Wabash, St. Louis & Pacific Railway Company, being the real owner of the railroad known as the Des Moines & St. Louis Railroad, has received two hundred and seventy (270) bonds of one thousand dollars each. G. M. Dodge seventy-four bonds; Polk & Hubbell two (2) bonds and the Des Moines & Northwestern Railway Company, successor of the Des Moines Northwestern Railway Company, one hundred and fifteen (115) bonds, making in all four hundred and sixty-one bonds, and as a further part of such purchase price the company has paid to the purchasing committee, G. M. Dodge and the Des Moines Northwestern Railway Company two hundred and fifty-seven and 21-100 dollars in cash, and

Whereas, there still remains four hundred thousand dollars (\$400,000.00) of the purchase price of said property yet unpaid, which sum is to be paid in capital stock, and

Whereas, by agreement between the several persons and corporations owning the said property prior to the said transfer, so much of the purchase price as was to be paid in capital stock was to be divided among three corporations, to-wit: one-half to the Des Moines & St. Louis Railroad Company, one-quarter to the St. Louis, Des Moines & Northern Railway Company and one-quarter to the Des Moines Northwestern Railway Company, and

Whereas, the purchasing committee of the Wabash, St. Louis & Pacific Railway Company is now the owner of the property of the Des Moines & St. Louis Railroad Company, including its proportion of stock, and the Des Moines & Northern Railway Company is now the owner of the property of the

St. Louis, Des Moines & Northern Railway Company, including its proportion of said stock, and the Des Moines & Northwestern Railway Company is now the owner of the property of the Des Moines Northwestern Railway Company, including its proportion of said stock, and

Whereas, the articles of incorporation have been amended so as to conform to the true intent of the several parties,

First. That the *purchase price* of the property originally acquired by the company, as above stated, be fixed at said sum of eight hundred sixty-one thousand two hundred fifty-seven and 21-100 (\$861,257.21) dollars as of the date of the conveyance thereof.

Second. That the payment of a portion of such *purchase price* in first mortgage bonds, as above set forth, be confirmed and approved.

Third. That to complete the *payment of such purchase price*, the President and Secretary are hereby authorized to issue certificates for thirty-nine hundred and ninety-two (3992) shares of stock, which shares, including eight already issued on behalf of said parties, aggregate four thousand (4,000) shares, as follows:

To the purchasing committee of the Wabash, St. Louis & Pacific Railway Company, nineteen hundred and ninety-six (1996) shares.

To the Des Moines & Northern Railway Company nine hundred and ninety-eight (998) shares, and to the Des Moines & Northwestern Railway Company nine hundred and ninety-eight (998) shares.

Fourth. That the proceedings heretofore had respecting the issuance of capital stock, so far as such proceedings are inconsistent with said amendments to the articles of incorporation or with this resolution, are hereby modified to conform heretofore."

This resolution and preamble were unanimously adopted by all the stockholders present. We have therefore set out here in detail the understanding of all the persons who were active in the transactions under consideration and in whose mind there is apparently no question but that the defendant company purchased something with its more than \$861,000.00 which it paid, and that something which it purchased was the terminal property.

Not only was this the expression of the persons who were present at this meeting, but this was the expression of the railway companies themselves, who, as successors of the original parties to the contract, were present, because this was a stockholders meeting and this was the act of the stockholders, among whom were numbered these railroads, and not the act of the Des Moines Union Railway Company as a separate identity. But upon this thought we will enlarge in another division of our argument.

These amendments were adopted with great deliberation after full notice and information to all in anywise concerned. They seem to have originated with Mr. Cummins, who at the time was counsel for the Wabash, for the Des Moines Union, and for General Dodge, who was virtually the owner of the Des Moines and Northern. He suggested the need of amendments at the meeting of stockholders of the Des Moines Union on January 3, 1890. On January 22d he wrote to Col. Blodgett concerning the matter and proposed a conference. He discussed the matter with Mr. Hays, who was general manager of the Wabash. On January 27th he wrote to General Dodge enclosing a copy of the proposed amendments and discussing them. He spoke to Mr. Hubbell, who at first was opposed to them. (Rec.,

Vol. III, pp. 1210 to 1214.) Mr. Cummins, who testifies to this, produces the letters written by him at the time. And the records of the Company show the facts in greater detail.

At the meeting of January 3d Mr. How, then Vice-President of the Wabash, and Mr. Hays, General Manager of the Wabash, were present as Wabash representatives. Mr. How moved and it was carried "that the question of amending the articles of incorporation of this Company, as well as the question concerning the issuing of stock for the purchase price of the terminal property, be referred to attorneys, W. H. Blodgett and A. B. Cummins for their investigation and recommendation." (Rec., Vol. IV, p. 1307.) General Dodge presided at this meeting. He represented the Des Moines and Northern. F. M. Hubbell was present representing the Des Moines and Northwestern. Thus the three railway companies were all represented. The meeting adjourned to February 18th.

At the adjourned meeting Dodge, How, Hays and Blodgett were represented by proxy. The Secretary reported that he had notified each stockholder of the meeting and that amendments to the articles of incorporation would be offered. Mr. Cummins presented the amendments. On motion of Mr. Hubbell the meeting was adjourned to April 8th to give further opportunity to examine the amendments. (Rec., Vol. IV, p. 1311.)

At the April meeting the Wabash representatives present were How and Hays. Col. Blodgett was represented by proxy as was General Dodge. Mr. How presided. The remaining railroad representatives were present in person. At this meeting one by one the amendments were adopted. (Rec., Vol. II, pp. 488 et seq.)

Thus it was not until more than three months after the matter was broached and after every stockholder had had months of notice that the final action was taken. It will not now serve to say that they knew not what they did.

And when these articles were amended everybody in interest knew that stock of the Des Moines Union had on February 5, 1890, been sold to individuals, five hundred shares to General Dodge and the same number to F. M. Hubbell. At the directors' meeting of the Des Moines Union held on the same day as the stockholders' meeting Mr. Hays moved and the Board adopted the following resolution:

“Resolved, That the shares of the capital stock of this corporation of the par value of fifty thousand dollars sold by the Purchasing Committee of the Wabash St. Louis & Pacific Railway Company to F. M. Hubbell, which sale has been ratified by the Des Moines & St. Louis Railroaad Companay, be approved and the transfer thereof to said Hubbell upon the books of the company be and the same is hereby ordered.” (Rec. vol. IV, p. 1312.)

A like resolution respecting the sale of shares to General Dodge was offered by Mr. Cummins and was adopted.

Thus the amendments in questions were made with full knowledge that shares of stock of the Des Moines Union were held by individuals as well as by railway companies. This was in harmony with the laws of Iowa and by all concerned was regarded as consonant with the purpose of the parties in respect of the terminal property.

THE ISSUE, SALE AND TRANSFER OF THE CAPITAL STOCK OF THE DES MOINES UNION RAILWAY COMPANY.

The disposition of the capital stock which was issued by the defendant company in part payment for the terminal is important not only as bearing upon the intention of the parties in relation to title to the property, but also on the issue of estoppel which is set up in the defendants' answer.

It will be remembered that by the terms of its original articles, the defendant's capital stock was fixed at \$1,000,000.00, all of which it was contemplated should be issued in payment for the terminal property. Likewise, the resolutions of January 1, 1885, authorizing the transfer of the ownership of the terminal property to the defendant, contemplated that defendant would issue its capital stock in payment therefor to the persons or corporations entitled thereto, who were presumably the three railroads parties to the contract of January 2, 1882, and this would be in the following proportions:

One-half to the Des Moines & St. Louis;

One-fourth to the Des Moines Northwestern;

One-fourth to the St. Louis, Des Moines & Northern.

In considering this issue, it is well to keep in mind that the Wabash Company was the owner of all the stock and bonds of the Des Moines & St. Louis Company and of one-half of the stock and all the bonds of the Des Moines Northwestern Company. It was also the lessee in perpetuity of the roads of these two companies. The result was that these two roads were sub-

stantially Wabash properties and they were in fact so treated by the Wabash Company. It is also well to keep in mind that General Dodge advanced all the money to build the St. Louis, Des Moines & Northern line, and a considerable part of the money to acquire the terminal property. As we have heretofore stated, the Wabash, St. Louis & Pacific Railway Company became insolvent and its property placed in the hands of a receiver about 1884, in a proceeding to foreclose a general mortgage given by that company. In the process of this foreclosure proceeding a purchasing committee composed of James F. Joy, Ossian D. Ashley, Thomas H. Hubbard and Edgar T. Welles, and representing the bondholders of the Wabash Company, was organized, who acquired title by foreclosure sale to all of the property of the Wabash Company, including the interest of that company in the Des Moines & St. Louis and the Des Moines Northwestern companies in the early part of 1886. (See deed Mercantile Trust Company to Purchasing Committee, Vol. II, pp. 706-8, and deed Wabash, St. Louis & Pacific Railway Company to Purchasing Committee, Vol. II, pp. 536-42.)

This Purchasing Committee as alleged in the amended bill of complaint had power under the agreement creating it to purchase and hold all of the mortgaged property * * * "It being provided in said agreement that said Purchasing Committee might, after the foreclosure of said mortgaged properties, dispose of the same in such manner as they might deem to be for the best interests of the holders and owners of said bonds, or organize or cause to be organized new corporations to take title to and operate said railroad properties for the use and benefit of said bondholders." (Rec., Vol. I, pp. 63 and 64.)

On October 9, 1886, the firm of Polk & Hubbell of Des Moines entered into a written contract with the Purchasing Committee (Vol. IV, pp. 1573-4), by which the latter agreed to secure title to the railroad of the Des Moines Northwestern Railway Company by foreclosure of the trust deed thereon, and sell the same, including "a one-fourth interest in the terminal property at Des Moines," to Polk & Hubbell for \$450,000.00, the same to be paid in first mortgage bonds secured by a mortgage on that part of the "railway lying between Farnham Street" (the western limits of the terminal property) "and the Town of Fonda." This agreement was ratified by the directors of the Wabash Company (Ex. 264, Vol. IV, pp. 1574-5).

On September 10, 1887, the Purchasing Committee and Polk & Hubbell entered into a supplemental agreement with respect to this (Vol. IV, pp. 1575-6). One of the purposes of this supplemental contract was to provide that Polk & Hubbell should further secure the \$450,000.00 to be paid to the Purchasing Committee, by giving them a lien upon the one-fourth interest in the terminal property. This provision in the contract reads as follows (p. 1576):

"Simultaneously with the conveyance above mentioned of one-fourth interest in the terminal property at Des Moines, the same shall be mortgaged back to the purchasing committee for the further security of the said \$450,000. In case, however, the terminal property at Des Moines shall be merged in a terminal company either before or after the transfer of one-fourth interest as above, *the bonds and stock received from the Terminal Company in exchange for said one-fourth interest shall be transferred in lieu of the property* to Messrs. Polk & Hubbell, or their assignees."

By the terms of this contract the purchasing committee retained the option of doing either one of two things in carrying out the contract by which they agreed to transfer to Polk & Hubbell "a one-fourth interest in the terminal property at Des Moines;" either,

First. Transfer to Polk & Hubbell a one-fourth interest in the terminal property itself; or

Second. In the event "the terminal property at Des Moines shall be merged in a terminal company either before or after the transfer of one-fourth interest as above," to transfer to Polk & Hubbell "the bonds and stock received from the Terminal Company in exchange for said one-fourth interest * * * *in lieu* of the property."

Now it is perfectly clear that a transfer of the stock and bonds of the Terminal Company could not be "*in lieu of the property*" unless the Terminal Company acquired a good title to the property. This contract was made September 10, 1887, less than two months prior to the time we find Colonel Blodgett in St. Louis preparing the mortgage of the Terminal Company re-
citing the fact that the Terminal Company has acquired and owns the terminal property. It shows clearly what was in the minds of the parties as to the disposition of the title and ownership of the terminal property. They were looking forward to transferring the title and ownership to the Terminal Company.

In carrying out this contract there was a delivery of one-fourth of the stock and bonds of the defendant company "*in lieu of*" one-fourth of the terminal property (testimony of F. M. Hubbell, Vol. III, pp. 1007-9).

On February 5, 1890, F. M. Hubbell contracted to purchase of the "purchasing committee" certain bonds and a one-fourth interest in the capital stock of the Des

Moines Union Railway Company (Ex. 297, Vol. IV, p. 1599). Immediately following the making of this contract it was agreed between Mr. Hubbell and General Dodge that the latter should participate in the purchase of the stock and bonds (testimony of F. M. Hubbell, Vol. III, pp. 1009-10). This was followed by making separate contracts with the purchasing committee (testimony of F. M. Hubbell last above referred to, and Exs. 298-300, Vol. IV, pp. 1600-2). This sale of stock was ratified at a meeting of the board of directors of the Des Moines & St. Louis Railroad Company, held April 8, 1890 (Ex. 185, Vol. IV, p. 1434). The purchasing committee accounted to the complainant, the Wabash Railroad Company, for the money paid by Hubbell and Dodge for this stock (Vol. IV, p. 1543, at top of page, and Ex. 244, Vol. IV, p. 1558). Now, what did the purchasing committee, the Wabash Company and the Des Moines & St. Louis Company intend to sell Messrs. Hubbel and Dodge when they took and retained their money for stock in the defendant company? Did they intend thereby to transfer to them a valuable interest in the terminal property, or were they simply intending to transfer some nicely lithographed paper which didn't represent anything? The natural inference is that they intended to transfer something of value, and if they had any other intention they did not advise Hubbell or Dodge of it. Did they act intelligently? The purchasing committee owned and had for years owned and managed the Wabash property. The persons present at the meeting of the directors of the Des Moines & St. Louis Company which ratified the sale of this stock were James F. How, vice-president of the Wabash Company; C. M. Hays, general manager of the Wabash Company;

A. B. Cummins, local attorney for the Wabash Company; F. M. Hubbell, H. S. Priest, general attorney for the Wabash Company, and George S. Grover, assistant general attorney for the Wabash Company (Vol. III, pp. 1011-12). Certainly these people knew what was intended by the transaction which culminated in the transfer of the terminal property to the defendant company.

Again on June 5, 1890, Mr. Hubbell made a contract with the purchasing committee by which he bought \$50,000.00 of the Des Moines Union bonds and 500 shares of Des Moines Union stock for \$57,736.00 (Vol. IV, p. 1613). The bonds at this time were worth about ninety cents on the dollar (Ex. 248, Vol. IV, p. 1561). This sale of stock was ratified by a resolution of the board of directors of the Des Moines & St. Louis Company on February 11, 1891 (Ex. 187, Vol. IV, p. 1437). The money paid for these bonds and this stock came into the hands of the purchasing committee (Vol. IV, p. 1560), and the committee accounted to the complainant, the Wabash Company, for the same (Vol. IV, p. 1543).

Does it now lie in the mouth of the Wabash Company to say that this stock was not intended to represent any valuable interest in the terminal property, when its predecessor, the purchasing committee, sold it to Hubbell for a valuable consideration, which consideration passed to the Wabash Company which now retains it? It can only represent a valuable interest in the terminal property if the Terminay Company acquired a good title to the property.

In this connection see the letter of O. D. Ashley, president of the Wabash Company, and one of the purchasing committee, to Mr. Hubbell, of April 5, 1890

(Vol. IV, pp. 1602-3), in which, speaking of the proposed sale of this second 500 shares of stock in the defendant company, which it will be remembered left in the hands of the purchasing committee one-eighth of such capital stock, Mr. Ashley says:

“It must be understood, of course, that a one-eighth interest in the capital stock shall be sufficient to represent a proprietorship in the company according to the understanding we had when you were here.”

The capital stock could not represent a proprietorship unless the corporation owned the property.

On January 15, 1892, all the capital stock of the defendant company held by the Des Moines & Northwestern, the Des Moines & Northern, F. M. Hubbell, and General Dodge, aggregating 3,500 shares (except a few shares standing in the name of the directors), was transferred to the Des Moines, Northern & Western Railway Company (Vol. II, p. 711), a consolidation of the Des Moines & Northern and the Des Moines & Northwestern companies.

On October 4, 1893, the Des Moines, Northern & Western Railway Company pledged 2,500 of these shares of stock in the Des Moines Union Company to F. M. Hubbell & Son to secure certain indebtedness to that firm (Vol. IV, pp. 1480-1), and on January 29, 1894, it sold this same stock to F. M. Hubbell & Son in satisfaction of certain indebtedness (Vol. IV, pp. 1482-3). At this last meeting there were present the following stockholders of the Des Moines, Northern & Western Railway Company: F. M. Hubbell, L. M. Martin, A. B. Cummins, A. N. Denman and H. D. Thompson, who constituted all the stockholders of that

company except General Dodge, who held 5,000 shares; W. R. Warfield, who held 50 shares, and F. C. Hubbell, who held one share. F. C. Hubbell is a defendant in this suit and is not complaining; W. R. Warfield has never complained, and General Dodge was told of this sale within a few days thereafter and ratified it (Vol. III, pp. 1017-8). This stock was transferred on the books of the defendant company to F. M. Hubbell & Son on October 4, 1893, and has ever since stood in that name.

The first interest, either direct or indirect, which the complainant, the Chicago, Milwaukee & St. Paul Railway Company, acquired in the Des Moines, Northern & Western Railway Company was by virtue of the two contracts of March 15, 1894 (Ex. 80, Vol. II, p. 838; Vol. IV, p. 1618), which were not, however, executed until several months after that date and to which we will make more extended reference in another division of our argument. Prior to this the Chicago, Milwaukee & St. Paul was advised in writing that the Des Moines, Northern & Western Company owned only 1,000 shares of stock in the defendant company and that five-eighths of the stock was owned by individuals (Vol. IV, p. 1617).

The letter is as follows:

“February 22, '94.

Mr. Roswell Miller, President,
Chicago, Milwaukee & St. Paul Railway Com-
pany, Chicago, Ill.

Dear Sir:—

Your favor of the 20th is received and noted.
Enclosed I send you a copy of the Articles of
Consolidation and Incorporation and Trust Mortgage
of the Des Moines, Northern & Western Railway

Company. There has been bonds issued on this property to the amount of \$2,770,000. I have no printed copy of the articles of incorporation of the Des Moines Union Railway Company, but will say they were drawn by our attorney, Mr. A. B. Cummins, and I think are all right, and if important to you, can have a copy made and sent you. The amount of bonds authorized by that corporation is \$800,000, bearing 5 per cent interest, of which amount \$612,000 have been issued. I enclose plat of Des Moines Union. We have about five miles of right of way occupied by about twenty miles of track. *The Des Moines, Northern & Western Railway Company own one-fourth of the capital stock of the Des Moines Union Railway Company. The Wabash owns one-eighth and five-eighths is owned by individuals.*

If you desire any further information I shall be glad to furnish it.

Yours truly,
(Signed) F. M. Hubbell,
President."

It therefore appears without controversy that the defendant company issued in payment for this property \$400,000.00 of its fully paid capital stock, all of which went to the predecessors of the complainants; that their predecessors sold five-eighths of this stock for money, upon the theory that it represented a valuable interest in the property, and that this money is still retained by complainants. So far as the predecessors of the Wabash were concerned, they were either honest or dishonest. If they were honest, they intended that Hubbell and Dodge, when they bought this stock, should get something for their money, which intention necessarily involves the thought that the Terminal Company held a good title to the property. If they

were dishonest, their successors have received the money and have no standing in this Court. We prefer to think they were honest, and there is nothing in the record to lead us to think otherwise.

So far as the Chicago, Milwaukee & St. Paul Company is concerned, their predecessors thought they were parting with something of value when they disposed of this stock, and that company acquired its interest with full understanding of the situation.

At the end of this argument will be found two diagrams—one showing the various changes in the ownership of the capital stock, and one showing the transfers of the capital stock.

It will no doubt be said, as it has been, that there was a great disparity between the value of this stock and the price paid for it. Nothing could be further from the fact at the time. The three railway enterprises had culminated in disaster, as indicated by the multiplicity of foreclosure shown by the record. They could none of them pay the interest on their bonded debt. Take, for example, the Des Moines Northwestern. It had a narrow gauge line from Des Moines to Fonda, a distance of about 113 miles, and it had a one-fourth interest in the Des Moines terminal property. The line of railroad, not the terminal interest, was mortgaged to secure \$800,000.00 of general Wabash bonds. So early as 1887 it was in arrears for interest upon this debt in the sum of \$300,000.00, showing that it had never paid a penny of return on the investment. The Wabash virtually owned this property, but it was a burden and not a benefit. The purchasing committee made an agreement with Polk and Hubbell which came to this: the railroad was to be cleared by foreclosure proceedings of all its old bur-

dens and turned over to them, together with one-fourth interest in the terminal property, or the equivalent in stocks and bonds of the Terminal Company if one was formed. Polk and Hubbell were to pay for this by bonding the railroad for \$450,000.00 and turning over the bonds to the purchasing committee. They were not to incur any personal liability. In other words, the bonded debt and interest was scaled down more than 54 per cent, and then with the terminal interest given to Polk and Hubbell. Nor was this all. A little later the bonded debt was scaled down to \$400,000.00, which F. M. Hubbell agreed personally to pay, as follows: \$112,000.00 in terminal bonds, which he had gotten in the purchase, and the remainder in his individual notes, so that he got the railroad and one-fourth of the stock of the Terminal Company for \$288,000.00.

A Terminal Company serving three railroads of this kind as its principal business, and bound to render that service at cost was not a very promising institution. The only chance for value in its stock in view of the contract of 1889 was in what are called "surplus earnings," as to which we will speak presently.

General Dodge was identified with railroad construction and operation all his life, and so was optimistic with respect to such enterprises and capable of appreciating their value. And he was interested in these Des Moines roads from the beginning. What did he think of this terminal stock? In 1894, after the Hubbells had acquired the stock, they now hold from the Des Moines, Northern & Western Railroad Company, a large block of whose shares the General held, Mr. Hubbell met him and showed him the record of the transaction and told him "that Hubbell & Son had bought this (terminal) stock of the company, and he expressed

himself satisfied." And Mr. Hubbell offered to let him have an interest in the stock with him, but he said he did not want it. "He said he thought it would be valuable at some time, but he did not want to invest in it." (Rec., Vol. III, p. 1018.)

The "surplus earnings" were revenues derived from the rent of property not immediately required for railroad uses, and payments for switching services rendered, not under contract, for other outside railroad companies and for transportation over the terminal lines. At the beginning they were insignificant and negligible.

There was no issue as to these which called for a full and detailed showing, but there is enough in the record to show substantially what they were. We submit what is shown, omitting cents.

December, 1890	\$151.	Rec., Vol. II, p. 273.
January, 1890	160.	" " " " 273.
February, 1890	168.	" " " " 274

During this month Hubbell made his first purchase of stock.

May, 1890 \$218. Rec., Vol. II, p. 276.

Hubbell now made his second purchase.

December, 1890 \$200. Rec., Vol. II, p. 278.

For the eleven months from January 1, 1891, to December 1st of that year, \$3,763 (Rec., p. 281), or on the principle of average \$4,116 for the entire year, or at the rate of about 1 per cent on the issued stock.

There is no showing for the period from December 1, 1891, to January 1, 1898. For the years following,

until controversy arose between the parties, the figures are as follows:

1898	\$10,825.	Rec., Vol. IV, p. 1371.
1899	17,211.	" " " " 1371.
1900	21,333.	" " " " 1384.
1901	25,643.	" " " " 1385.
1902	29,922.	" " " " 1386.
1903	35,570.	" " " " 1387.
1904	46,752.	" " " " 1388.
1905	54,763.	" " " " 1389.
1906	61,081.	" " " " 1397.
1907	75,513.	" " " " 1406.

Not one dollar of these earnings was distributed as dividends. The money, \$200,000.00, explicitly shown, and the revenues for eight years not so shown, was applied to improvements of and additions to the property, the remainder \$176,715.00 appearing and being carried as "surplus earnings" at the time the evidence closes.

The evidence shows conclusively that these surplus earnings, insignificant at first, increased after the Hubbells acquired their stock, slowly at the beginning and more rapidly later as the terminal properties were improved and expanded, and as the City of Des Moines grew and the volume of its business increased, and during this period of eighteen years, covered by the evidence, the enterprise was in the charge of the Hubbells, the father as secretary and the son as president, the father giving much of his time, and the son most of his to their official duties, and this without salaries, and with no other compensation than would in the future come to them as to the other stockholders from the increased welfare and prosperity of the enterprise in which they were embarked.

When the Wabash purchasing committee sold this stock its value was problematical and entirely speculative. If the future was as the past it was worth nothing. They preferred the price for which they sold at the time. Now that the future has justified the faith of the Hubbells, they want to regain the property they sold and to retain the price for which they sold it.

Ever since May 1, 1888, the terminal property has been treated by everybody as the absolute property of the defendant company.

The defendant company took possession of the property on May 1, 1888, and has ever since possessed and operated it.

The corporate action of the defendant company from the time of its organization to January 8, 1909, in so far as it does not appear in complainants' testimony, appears in defendants' exhibits, volume IV, pages 1297 to 1413. We do not intend at this time to refer to it in detail. Its examination will disclose the undisputed fact that at all times the defendant treated this property as its own. It bought the original terminal property and paid for it. It acquired other property, took the title in its own name in fee simple; improved the property on its own motion and according to its own ideas, and paid for it with its own money. It elected its own directors and its own officers, made its own contracts, and in every way conducted its own business. At no time did the defendant do a single act recognizing any rights of the complainants or their predecessors in the property, except the rights which they possessed by reason of their stock interest. In examining this record, bear in mind that at all times there was on the board of directors of the defendant

company one or more persons representing the stock of the complainant, the Wabash Company or its predecessors, and two or more directors representing the stock interests of the complainant, the Chicago, Milwaukee & St. Paul Railway Company, or its predecessors.

But the interesting question is, how has this property been treated by the complainants and their predecessors since May 1, 1888?

First, as to the Wabash Company (and in considering this it is interesting to note how this property was treated by the Wabash Company before and after May 1, 1888, and to note what, if any, change is apparent in its relation to the property at that date):

At a meeting of the executive committee of the Wabash Company, held December 26, 1882 (Ex. 227, Vol. IV, p. 1529), a resolution was passed authorizing the transfer to the Mercantile Trust Company of New York of certain property to secure certain indebtedness, and among the property scheduled is "Real Estate in Des Moines, \$300,000."

At a meeting of the purchasing committee, held August 6, 1886 (Ex. 240, Vol. IV, p. 1555), the terminal property in Des Moines is referred to as follows:

"And the sale to include only one-quarter of the terminal property formerly owned by the Wabash Railway Company and General Dodge; this sale leaving the purchasing committee or the new Wabash Company in possession and ownership of one-half of said terminal property."

We have already shown how Polk & Hubbell in October, 1886, made a contract with the purchasing commit-

tee to purchase the property of the Des Moines Northwestern Company and "a one-fourth interest in the terminal property at Des Moines" (Ex. 263, Vol. IV, p. 1573), and how in a supplemental contract the purchasing committee had secured the option of delivering "in lieu of" the property, one-fourth of the stock and bonds of the terminal company.

Under date of February 25, 1888, Mr. Charles M. Hays, general manager of the Wabash Western Railway Company, made his annual report, which was embodied in the annual report presented to the stockholders on March 13, 1888, as follows (Ex. 229, Vol. IV, p. 1532):

"There has also been erected during the year an addition of fifteen stalls to roundhouse at Moberly at a cost of \$15,625.79
Fifteen-stall roundhouse at Des Moines, Iowa (which will be conveyed, with other property at that point, to the Des Moines Union Railway Co.) \$12,472.96"

Thus it appears that prior to the execution and delivery of the deeds to the Terminal Company, the terminal property is referred to and treated by the parties as property of the Wabash Company, although the title to most of it stood in the name of trustees.

A very different attitude is shown on the part of this complainant and its predecessors in relation to this property after May 1, 1888.

On March 5, 1889, Mr. How writes to F. M. Hubbell (Ex. 290, Vol. IV, p. 1595) as follows:

"I am in receipt of your letter of Mar. 2nd. As the property referred to in your letter now be-

longs to the Des Moines Union Ry. Co., I think that Co. should pay the interest on the mortgage and will also arrange to take care of the principal. The last payment of interest was made in the month of Jan'y, 1886."

Again on April 1, 1889, he writes (Ex. 292, Vol. IV, p. 1596) :

"I have just returned from the East and am in receipt of your letter of the 23d ult. I think that the interest due on the deed of trust on the lot owned by the Terminal Co. referred to in your letter should be paid and an arrangement made to continue the deed of trust on the property at a lower rate of interest. Of course the interest now due and to become due should be paid by the Terminal Co."

Again he writes to Polk & Hubbell under date June 28, 1889 (Ex. 294, Vol. IV, p. 1597) :

"I am in receipt of yours of June 26th calling attention to certain bills for delinquent taxes on railroad property in Des Moines. Any such bills that are a lien on the property transferred to the Des Moines Union Ry. Co. should be paid by that Co., *all the property having been bought for that Co. and since been transferred to it.*

I am also in receipt of a letter from Mr. Hubbell of same date referring to your letter and speaking of a similar tax certificate held by him on the same property. Will you please show this letter to him."

These letters were written very shortly after the transfer of the property, and were written by James F. How, who had been the moving spirit in this matter during all the years since 1881, who knew the in-

tent of the transaction, and he seems to have no doubt as to who owned this property.

We have already shown the facts in relation to the amendments to the articles of incorporation of the defendant company of April 8, 1890, and the resolutions passed that day with respect to the title to this property and the payment of the purchase price therefor by the defendant company, and the part which was taken in the same by James F. How, vice-president; Charles M. Hays, general manager ,and Wells H. Blodgett, general counsel of the Wabash Company, all of whom were familiar with the transaction, were active in promoting the terminal organization, and knew what was intended.

Again on May 20, 1890, Mr. How wrote Mr. Hubbell as follows (Ex. 304, Vol. IV, p. 1612):

“I am just in receipt of yours of the 17th, giving list of certain property that you have purchased in Des Moines, which you offer to sell to the Des Moines Union Raiway Company at the price you paid for same, with interest from the date of purchase, said offer to be accepted at any time within thirty days of the date of your letter. *As I understand it, this question will have to be acted upon by the board of directors of the Des Moines Union Railway Company, and I suppose your letter is written with the idea of ascertaining how Mr. Hays and myself would vote on the question at such a meeting. It is our opinion that your offer should be accepted, provided the Des Moines Union Railway Company can pay for the property in their bonds at par, with accrued interest.”*

This doesn't sound as though Mr. How had in mind that the ownership of this property was in the complainants or their predecessors.

On June 6, 1890, General Dodge wrote Mr. Hubbell as follows (Ex. 305a, Vol. IV, p. 1614):

"I duly received yours of May 17th in re. property you have bought at Des Moines. I would like to have you send me a map showing this property. I think the Des Moines Union Railway Co. should take it as soon as they can raise the money to do so on their bonds."

Note the letters of Charles M. Hays to Mr. Hubbell, dated April 28, 1892, and April 22, 1893 (Exs. 306-7, Vol. IV, pp. 1616-7), in the latter of which he says:

"While it seems to me that it is desirable that the lot should be owned by the Des Moines Union Company, we are not in such position that we feel we can conveniently advance the amount that would be chargeable to us on usual basis for distributing the expense of such purchase. *I think since you are now the largest holder in Des Moines Union bonds and stock, you should sell the lot to the company and take bonds at par for same.* As a director of the Des Moines Union Company I am willing to approve getting lot in this way, but I am not willing to approve of it on basis of each company contributing its proportion of the purchase price and taking bonds therefor."

If the Hubbell stock-holding interest was intended to be of no value to him, why should he sell the lot to the company and take its bonds therefor?

There will be found among defendants' exhibits voluminous correspondence passing between the defend-

ant company and the Wabash Company and its predecessors, covering the period from May 1, 1888, to the time of the commencement of this suit. It would unnecessarily extend this argument to refer to this correspondence in detail. With respect to it we desire to say that there isn't a single letter passing between the parties in this period of twenty-three years which does not either tacitly or expressly recognize the absolute ownership of the defendant company, and no intimation at any time that the Wabash Railroad Company or its predecessors claimed any interest in the property whatever, except that to which it was entitled by reason of its being the owner of some of the defendant's shares of stock. We will content ourselves with here calling attention to a few of the more solemn and formal acts of the Wabash Company and its predecessors, which show conclusively that no claim was made to any interest in this property other than the stock-holding interest.

CORPORATE ACTS OF WABASH COMPANY.

At a meeting of the board of directors of the Des Moines & St. Louis Railroad Company held in New York on March 16, 1899, there were present the following persons: O. D. Ashley, Edgar T. Welles, Cyrus J. Lawrence, Thomas H. Hubbard and J. C. Otteson. Ashley, it will be remembered, was president of the Wabash Company, and he with Edgar T. Welles and Thomas H. Hubbard had been three of the members of the purchasing committee. Otteson was secretary of the Wabash Company. These persons were familiar with the history of the terminal property and the intention of the parties with respect thereto. At this

meeting (see Ex. 192, Vol. IV, pp. 1446-9), a resolution was passed authorizing the execution of a deed from the Des Moines & St. Louis Railroad Company to the complainant, the Wabash Company, of the property of the former company, which was described in the resolution and in the deed so authorized as follows (pp. 1448-9) :

"commencing at a point in or near the City of Des Moines, where said road connects with the tracks of the Des Moines Union Railway Company, and extending from thence in a southeasterly direction through the counties of Polk, Marion and Monroe to the town or City of Albia, in Monroe County, a distance of about sixty-seven miles, * * * and especially including all the rights and leasehold and other interests of the first party under a contract dated May 10, 1889, between the Des Moines Union Railway Company of the first part and the Des Moines & St. Louis Railroad Company, the Des Moines & Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company, of the second part."

According to the complainants' theory, the Des Moines & St. Louis Railroad Company owned a one-half interest in the terminal property, but it will be noted that this deed does not purport nor attempt to convey any interest in the terminal property whatever, except the interest it had under the lease of May 10, 1889, and in describing its railroad property it describes it as commencing at the point where its tracks connect with the tracks of the Des Moines Union Railway Company.

On January 1, 1899, the Wabash Railroad Company gave a mortgage to the Central Trust Company of

New York (Ex. 530, Vol. IV, p. 1928). This mortgage was prepared by Colonel Blodgett (testimony of Colonel Blodgett, Vol. II, p. 379), who had been the guiding spirit in the terminal transaction and was fully familiar with the situation. This mortgage covered what is known as the Des Moines division, the northerly terminus of which is at Des Moines. Among the recitations in the mortgage is the following:

"And, whereas, the company owns the entire capital stock of the Des Moines & St. Louis Railroad Company, consisting of twenty thousand (20,000) shares of the par value of one hundred (\$100) dollars each, *and five hundred (500) shares of the capital stock of the Des Moines Union Railway Company* of the par value of one hundred (\$100) dollars each."

The property is described in the mortgage as follows (p. 1929):

"commencing at a point in or near the City of Des Moines, where said road connects with the tracks of the Des Moines Union Railway Company, and extending from thence in a southeasterly direction through the counties of Polk, Marion and Monroe to the town or City of Albia, in said County of Monroe, a distance of about sixty-seven miles; * * * *also five hundred (500) shares of the capital stock of the Des Moines Union Railway Company, of the par value of one hundred (100) dollars each;* * * * *and also all the leasehold rights and privileges of the company to use and enjoyment of the tracks, stations and terminal properties of the Des Moines Union Railway Company in or near said City of Des Moines, including also the rights and interests of the company in and to a certain terminal contract, dated the 31st day of July, 1897, and made by and between the Des*

Moines Union Railway Company, the company and the Des Moines Northern & Western Railroad Company, and in and to another contract, dated the 10th day of May, 1889, and made by and between the Des Moines Union Railway Company, the Des Moines & St. Louis Railway Company, the Des Moines & Northwestern Railway Company, and the St. Louis, Des Moines & Northern Railway Company."

The mortgage further provides:

"The company agrees at the time of the execution of these presents to deliver to and deposit with the trustee the above-mentioned terminal contract, dated the 31st day of July, 1897, * * * and also the other above-mentioned contract, dated the 10th day of May, 1889, * * * together with an assignment or assignments by the company to the trustee of all its rights and interest in and to said contracts, and the consents to such assignment or assignments of the remaining above-mentioned parties to said contracts or of their successors or assigns.

• • • • •
And the company further agrees at the time of the execution of these presents to deliver to, and deposit with, or cause to be delivered to, and deposited with the trustee, duly endorsed in blank, the above-mentioned shares of stock of the * * * Des Moines Union Railway Company, * * * and also a consent to the assignment or mortgage by these presents to the trustee of the above-mentioned shares of stock of the Des Moines Union Railway Company, which consent is to be given by the above-mentioned Des Moines Northern & Western Railroad Company, party to the above-mentioned terminal contract of the 31st day of July, 1897, or its successors or assigns."

It will be noted that this mortgage does not purport to cover any interest in the terminal property itself. It describes the complainants' property as commencing at a point at or near the eastern limits of the City of Des Moines, where it connects with the tracks of the Des Moines Union Railway Company, and then for the purpose of transferring to the mortgagee whatever rights it has with respect to the Des Moines Union Company or its property, it specifically and with great care provides for a transfer of the 500 shares of the capital stock in that company and the contracts by which it is entitled to be furnished terminal service by the defendant company for the period of thirty years from and after May 1, 1888. The man who drew this mortgage, and the parties who executed it, never suspected that the complainant had any interest in this terminal property except the interest represented by its share of the capital stock and its interest as a lessee or tenant under the terms of the operating contract.

The things we have called attention to are only a very few of the very many things appearing in this record which show that at no time between May 1, 1888, and the commencement of this suit did the Wabash Company, or any of its predecessors, or any of its officers, have the least suspicion that that company had any interest in the property in controversy other than its interest as a stockholder, or that the shares of stock held by the defendant, F. M. Hubbell & Son, were "merely nominal and of nominal value."

THE RELATION OF THE CHICAGO, MILWAUKEE
& ST. PAUL RAILWAY COMPANY AND ITS
PREDECESSORS TO THE TERMINAL
PROPERTY.

Going now to the history of the relations sustained by the complainant, the Chicago, Milwaukee & St. Paul Railway Company, and its predecessors, to the terminal property since May 1, 1888.

It will be remembered that the Des Moines Northwestern Railway Company in February, 1881, gave a mortgage to the Central Trust Company (Vol. II, p. 605) to secure certain general mortgage bonds of the Wabash Company.

It will also be remembered that in 1886 Polk & Hubbell made a contract and supplement thereto with the purchasing committee by which the committee undertook to foreclose the Des Moines Northwestern mortgage, acquire title to the property of that company, and sell the same, together with a one-fourth interest in the terminal property, or "in lieu thereof," one-fourth of the stock and bonds of the terminal company.

In pursuance of that contract, the purchasing committee caused the Central Trust Company to bring a suit in the District Court of the United States for the southern district of Iowa to foreclose that mortgage. The decree in the case appears in complainants' testimony (Vol. II, pp. 609-13). The decree describes the property as "being a line of railway extending from Farnham street, Des Moines, Iowa, through the counties of Polk, Dallas," etc. (p. 610). The deed to Polk & Hubbell executed in pursuance of the sale under that decree (Vol. II, pp. 613-5) describes the property (p. 614) as "being a line of railway extending from Farn-

ham street, Des Moines, Iowa, through the counties of Polk, Dallas," etc.

Farnham street was the western terminus of the terminal property, and this line of road extended westerly from that street. It will be seen that the Des Moines & Northwestern Railway Company, by virtue of this decree and these deeds, acquired title simply to the railway property commencing at Farnham street, the westerly limit of the terminal property.

On April 8, 1890, when the capital stock of the defendant company was issued, one-fourth thereof (1,000 shares, less two shares standing in the name of the two directors representing that company) was issued to the Des Moines & Northwestern Railway Company (Vol. II, p. 711), and thereby the Des Moines & Northwestern Railway Company acquired the only interest it had in the terminal property outside of the interest which it had as a tenant under the contract of May 10, 1880.

It will be remembered that the St. Louis, Des Moines & Northern Railway Company, which owned the line from Des Moines to Boone, on August 1, 1881, gave a mortgage to the Mercantile Trust Company (Vol. II, p. 552), which described the property (p. 554) as

"all its railroad extending as aforesaid, from the western boundary line of the City of Des Moines, in Polk County, Iowa, by way of Clive in said county, through the counties of Polk, Dallas and Boone," etc.

The western boundary line of the City of Des Moines was almost a mile west of Farnham street, the western boundary line being what is now known as Twenty-eighth street, and Farnham street being now known

as Sixteenth street. This left a piece of road extending from Farnham street to West Twenty-eighth street which was not covered by this mortgage, nor did the mortgage purport to cover any interest which the St. Louis, Des Moines & Northern Company had in the terminal property. For the purpose of extending the lien of this mortgage to cover the omitted property, the St. Louis, Des Moines & Northern Railway Company executed a supplemental mortgage to the Mercantile Trust Company (Vol. II, pp. 561-3), which after reciting the execution of the original mortgage says:

“Whereas, there was omitted from the description of the property conveyed by said mortgage a part of the road of the party of the first part which should have been included, and

Whereas, the board of directors of the party of the first part has this day authorized its president, and assistant secretary, to execute and deliver a supplement to said mortgage so that said omitted property shall be included in said mortgage.

Now, therefore, the St. Louis, Des Moines & Northern Railway Company, by this indenture doth grant, bargain, sell and convey unto the Mercantile Trust Company, as trustee, and to its successor or successors in trust, all that portion of its line of railroad lying between Farnham street, in the City of Des Moines, and the western corporate limits of said city, being situated in the County of Polk and State of Iowa, together with all the appurtenances thereto belonging or therein included, and *also all its interest of whatever kind in the obligation or stock of the Des Moines Union Railway Company*, and all its property of whatever name or nature not included and covered by said original mortgage.”

It will be noted that by this supplemental mortgage the only interest which is attempted to be transferred in the terminal property is the obligation or stock of the defendant company.

This mortgage was foreclosed by an action in the District Court of the United States for the southern district of Iowa, the bill of complaint therein appearing in complainants' testimony (commencing on page 563, Vol. II), and which bill of complaint, referring to this supplemental mortgage, describes the interest in the terminal property thereby conveyed as being the obligations or stock of the terminal company (p. 565). The decree in the case, which appears in complainants' testimony (commencing at page 578, volume II), describes the property in the same way. The deed executed to Solon Humphreys and J. T. Granger in pursuance of the decree describes the property in the same way (Vol. II, pp. 584, 590).

In November, 1889, articles of incorporation of the Des Moines & Northern Railway Company were adopted (Vol. II, pp. 592-6). On November 23, 1889, Solon Humphreys and others, who had purchased this property at the foreclosure sale, deeded it to the Des Moines & Northern Railway Company (Vol. II, pp. 596-7), the deed describing the property as follows:

“* * * The line of railway and franchises (except the franchise to be a corporation) formerly belonging to the St. Louis, Des Moines & Northern Railway Company, extending from Farnham street in the City of Des Moines, County of Polk and State of Iowa, through the Town of Clive and the counties of Polk, Dallas and Boone to the City of Boone * * * and all its interest in the stock of the Des Moines Union Railway Company.”

On April 8, 1890, when the defendant company's certificate of shares were issued, 1,000 shares (less two shares issued to the directors of the defendant company) were issued to the Des Moines & Northern Railway Company.

At a meeting of the stockholders of the Des Moines & Northwestern Railway Company, held October 12, 1891 (Ex. 199, Vol. IV, p. 1456), a lengthy resolution was adopted looking to the consolidation of the properties of the Des Moines & Northwestern and the Des Moines & Northern companies. In examining this resolution it is interesting to note that wherever the properties of these two companies are referred to they are described as commeneing at Farnham street, in the City of Des Moines, and extending in a westerly and northwesterly direction, and wherever their interest in the terminal property is concerned it is referred to as "shares of stock" of the defendant company. References are made to these matters in the following paragraphs of the resolution and the contract which is made a part of it: third (p. 1459), fourth and fifth (p. 1460), ninth, tenth and eleventh (p. 1461), fifteenth (p. 1463), and fourth paragraph of contract (pp. 1468-9). Nowhere in this resolution is any reference made to any claim on the part of these companies that they owned any interest in the terminal property itself.

Carrying out this resolution, articles of consolidation and incorporation of the Des Moines, Northern & Western Railway Company were adopted on the 14th of December, 1891 (Ex. 64, Vol. II, p. 624). By the terms of the second article (pp. 625-6) the property of the two constituent companies, the Des Moines & Northern Company and the Des Moines & Northwestern Company, became the property of the Des Moines, North-

ern & Western Railway Company, the consolidated corporation.

The objects of the new corporation were stated in part as follows (pp. 626-7) :

“(1) To own, complete, extend, improve, maintain, and operate the line of railway heretofore owned and operated by the Des Moines & Northwestern Railway Company, extending from Farnham street, in the City of Des Moines, Polk County, Iowa, through the counties of Polk, Dallas, Guthrie, Greene, Calhoun and Pocahontas to Fonda, in said last-named county.

(2) To own, complete, extend, improve, maintain and operate the line of railway heretofore owned and operated by the Des Moines & Northern Railway Company, extending from Farnham street, in the City of Des Moines, Polk County, Iowa, through the counties of Polk, Dallas and Boone, to the City of Boone, in said last-named county.

* * * * *

(10) *To purchase, own and sell capital stock of the Des Moines Union Railway Company, or any other company owning or operating terminal grounds, tracks or stations.”*

As we have already shown, upon the organization of this company, all the capital stock of the defendant company theretofore owned by the Des Moines & Northwestern Company, the Des Moines & Northern Company, by G. M. Dodge and by F. M. Hubbell, aggregating 3,500 shares, were transferred to and became the property of the Des Moines Northern & Western Railway Company.

On December 14, 1891, at a meeting of the stockholders of the Des Moines, Northern & Western Railway Company (Ex. 208, Vol. IV, p. 1476), a resolution was passed authorizing the giving of a mortgage to the Metropolitan Trust Company of New York. A part of that resolution is as follows (pp. 1477-8):

“Be it therefore resolved; that the Des Moines, Northern & Western Railway Company, the consolidated corporation hereinbefore referred to, shall duly execute and acknowledge a trust mortgage to the Metropolitan Trust Company of the City of New York, as trustee, which mortgage shall convey, under the usual terms and conditions, all its railroad extending from Farnham street, in the City of Des Moines, County of Polk, and State of Iowa, through the counties of Polk, Dallas, Guthrie, Greene, Calhoun, and Pocahontas, Iowa, to Fonda, in said last-named county, and also extending from Farnham street aforesaid over the same line to Clive, in the County of Polk, and thence through the counties of Polk, Dallas and Boone, Iowa, to the City of Boone * * * also a one-fourth interest in the capital stock of the Des Moines Union Railway Company; but it is expressly understood and agreed that said mortgage shall not convey an additional five-eighths interest in the capital stock of the said Des Moines Union Railway Company, of which the said company is the owner.”

In pursuance of this resolution, the Des Moines, Northern & Western Railway Company on the 15th day of December, 1891, executed a mortgage to the Metropolitan Trust Company of New York, which appears as exhibit 65, on page 633 of volume II. This mortgage described the property covered by it in the terms of the resolution above quoted (p. 637).

It will be remembered, as we have heretofore shown, that this five-eighths of the capital stock of the Des Moines Union Railway Company (2,500 shares) was transferred to F. M. Hubbell & Son on the 4th day of October, 1893, and has ever since stood upon the books of the defendant company in that name.

The first interest, either direct or indirect, which the Chicago, Milwaukee & St. Paul Railway Company had in the transactions under consideration, or in any of the companies interested in said transactions, grew out of two contracts dated March 15, 1894, one of which is a contract between that company and Frederick M. Hubbell and Frederick M. Hubbell & Son, and appears as complainants' exhibit 80 (commencing at page 838 of volume II), and the other of which appears as defendants' exhibit 309 (p. 1618, Vol. IV), and which was between the Des Moines, Northern & Western Railway Company and the Chicago, Milwaukee & St. Paul Railway Company. These contracts, however, were not actually executed until the 17th of July, 1894 (see testimony of F. M. Hubbell near bottom of page 1018, volume III).

The negotiations leading up to the making of these contracts were conducted by Mr. Hubbell, representing himself and the Des Moines Northern & Western Railway Company, and Roswell Miller, president of and representing the Milwaukee Company (testimony of F. M. Hubbell near top of page 1019, volume III).

By the terms of the contract between the Des Moines, Northern & Western Company and the Chicago, Milwaukee & St. Paul Company (Ex. 309, Vol. IV, p. 1618), the former company was to receive a division of the through rate on joint business, at percentages fixed in the contract and depending upon the origin and desti-

nation of the freight. In consideration of the execution of this contract, F. M. Hubbell and F. M. Hubbell & Son entered into the contract with the Chicago, Milwaukee & St. Paul Railway Company heretofore referred to (Vol. II, p. 838), by which the Hubbells made a present to the Chicago, Milwaukee & St. Paul Railway Company of 16,800 shares of the capital stock of the Des Moines, Northern & Western Railway Company and agreed to sell it an additional 6,468 shares at any time between January 1, 1897, and the first Monday in April, 1899, for \$46,200.00. The thing which induced the making of these contracts on the part of the Hubbells is detailed by Mr. F. M. Hubbell (near the top of page 1020, volume III) as follows:

“Some time during the summer of 1893, the Milwaukee Company notified the Des Moines, Northern & Western Railway Company that the divisions in freight interchanged between the two companies would be reduced from 50 per cent to 25 per cent. This great reduction in the division would prevent the Des Moines, Northern & Western Railway Company from earning its interest and operating expenses; and rather than submit to bankruptcy and a foreclosure, we made this arrangement in order to obtain an increase in the division in favor of our company to 40 per cent, hoping thereby that we could earn sufficient revenue to pay operating expenses and interest on the bonds.”

As we have heretofore shown, before the making of this contract and during the negotiations which led up to it, Roswell Miller, president of the Milwaukee Company, was advised that the Des Moines, Northern & Western Railway Company only owned 1,000 shares of stock in the defendant company, and that five-eighths

of the defendant's capital stock was owned by individuals (see letter of F. M. Hubbell to Roswell Miller, Ex. 308, Vol. IV, p. 1617).

It was further provided in sections 4 and 5 of the contract last above referred to (pp. 839-40) that under certain conditions the mortgage heretofore referred to and given by the Des Moines, Northern & Western Railway Company to the Metropolitan Trust Company, should be foreclosed and the property transferred to the new corporation, in which event the interest of the Milwaukee Company in the capital stock of the new corporation should be the same as its interest in the capital stock of the present corporation.

Afterward a suit was brought in the Circuit Court of the United States for the southern district of Iowa to foreclose the mortgage given by the Des Moines, Northern & Western Railway Company to the Metropolitan Trust Company, and in this suit a decree was entered which appears, commencing on page 645 of volume II, in which decree the property upon which a lien was established was described as

"a certain line of railroad extending from Farnham street, in the City of Des Moines, in Polk County, Iowa, through the counties of Polk, Dallas, Guthrie, Greene, Calhoun, and Pocahontas, to the Town of Fonda, in said last-named county, and also of a line of railroad extending from Clive to the County of Polk, through the said county to the City of Boone, in the County of Boone, and State of Iowa, * * * *Also a one-fourth interest in the capital stock of the Des Moines Union Railway Company, it being by the said mortgage expressly understood and agreed that the said mortgage did not embrace or convey an additional five-eighths interest in the capital stock of said Des*

Moines Union Railway Company of which the said Des Moines Northern & Western Railway Company was the owner."

In pursuance of this decree a sale was had at which the property was purchased by G. M. Dodge, F. M. Hubbell and F. C. Hubbell. A report of this sale appears as Complainants' Exhibit 67 (commencing on page 651, volume II), in which report the property sold is described in the terms used in the decree. This sale was approved, and on the 8th of February, 1895, the Commissioner made a Commissioner's deed to G. M. Dodge and others constituting the purchasing committee, in which the property transferred was described as in the decree (Ex. 69, Vol. II, p. 654).

On the 1st day of January, 1895, the articles of incorporation of the Des Moines, Northern & Western Railroad Company were adopted (Ex. 70, Vol. II, p. 657), in which the objects and purposes of the corporation were described in part as follows:

"First. To own, complete, extend, improve, maintain and operate the line of railway heretobefore owned and operated by the Des Moines Northern & Western Railway Company, extending from Farnham street, in the City of Des Moines, Polk County, Iowa, through the counties of Polk, Dallas, Guthrie, Greene, Calhoun, and Pocahontas, to Fonda, in said last-named county; also extending from Clive, in the County of Polk, through the counties of Polk, Dallas, and Boone, to the City of Boone, in said last-named county.

Twelfth. To purchase, own and sell capital stock of the Des Moines Union Railway Company, or any other company owning or operating terminal grounds, tracks or stations."

To this corporation G. M. Dodge and the other members of the purchasing committee transferred this property by deed appearing as Complainants' Exhibit 71 (Vol. II, p. 663), in which the property was described as in the deed from the Commissioner to them. In none of these records or documents is any reference whatever made to any possible interest (except through the stock) in the terminal property.

About the time of the execution of this deed there was held a meeting of the board of directors of the Des Moines, Northern & Western Railroad Company (Ex. 215, Vol. IV, p. 1487) in which it was resolved to purchase of G. M. Dodge and others constituting the purchasing committee this railway property, which was described as follows:

"A certain line of railroad extending from Farnham street, in the City of Des Moines, Polk County, Iowa, through the counties of Polk, Dallas, Guthrie, Greene, Calhoun, and Pocahontas, to Fonda, in the said last-named county; and also extending from Clive, in the County of Polk, through the counties of Polk, Dallas and Boone to Boone, in the County of Boone, and State of Iowa, * * * also a one-fourth interest in the capital stock of the Des Moines Union Railway Company."

At the same meeting it was resolved (p. 1490) to execute a mortgage to the Metropolitan Trust Company of New York as trustee, upon the property which was described as heretofore set out.

At a meeting of the stockholders of the Des Moines, Northern & Western Railroad Company, on March 5, 1895, certain resolutions were passed on this same subject, in which the property was described as in the deed and former resolution (Ex. 216, Vol. IV, p. 1492).

The Des Moines, Northern & Western Railroad Company after it acquired the property gave a mortgage to the Metropolitan Trust Company of New York (Vol. IV, p. 1518) in which the property was described:

"All its railroad, extending from Farnham street, in the City of Des Moines, County of Polk, and State of Iowa, through the counties of Polk, Dallas, * * * also a one-fourth interest in the capital stock of the *Des Moines Union Railway Company.*"

By the seventh section of the contract of March 15, 1894, between Hubbell & Son and the Chicago, Milwaukee & St. Paul Railway Company, it was provided (Vol. II, p. 841) that the board of directors of the Des Moines, Northern & Western Railway Company should consist of three persons who should be nominated by the St. Paul Company, and four persons to be nominated by Hubbell & Son.

At the annual meeting of the stockholders of the Des Moines, Northern & Western Railway Company, held on January 3, 1895 (ex. 214, vol. IV, p. 1486), this portion of the agreement was carried out and E. P. Ripley, A. J. Earling and P. M. Myers, representing the St. Paul Company, were elected upon the board of directors of the Des Moines, Northern & Western Railway Company, and thereafter three or more representatives of the Milwaukee were upon the board of directors of that company or its successor, the Des Moines, Northern & Western Railroad Company, and during these years the representatives of the St. Paul Company, and particularly Mr. Roswell Miller, president of that company, were active in the management of the affairs of the former company. In this way they

not only became familiar with the affairs of the Des Moines, Northern & Western Railway and Railroad Company, but also with the relations between that company and the defendant, the Des Moines Union Railway Company. They knew that the only interest which the Des Moines, Northern & Western Company had in the Des Moines Union Company was the interest represented by the 1,000 shares of stock which the former had in the latter (ex. 308, vol. IV, p. 1617). They were familiar with the foreclosure of the mortgage upon the property of the Des Moines, Northern & Western Railway Company, the organization of the Des Moines, Northern & Western Railroad Company, and the steps by which the property of the former was transferred to the latter, and had certified copies of all the records in respect thereto. They were furnished with copies of the articles of incorporation of the defendant, the Des Moines Union Railway Company, advised as to what property it owned, and furnished with copies of the contract of May 10, 1899, and the ratification thereof of July 31, 1897. (See the following exhibits of defendants, vol. IV: 317 and 318 (p. 1628); 319 and 320 (p. 1630); 321 (p. 1631); 322 (p. 1632); 323 (p. 1634); 324 and 325 (p. 1636); 326 (p. 1637); 339 (p. 1650); 340 (p. 1651); 341 (p. 1652); 342 (p. 1654); 343 and 344 (p. 1655); 345 (p. 1657); 415 (p. 1763); 416 (p. 1764); 417 and 418 (p. 1765); 419 and 420 (p. 1766); 421 (p. 1767); 425 (p. 1770).)

In the year 1898 the Chicago, Milwaukee & St. Paul Railway Company acquired all the outstanding capital stock and bonds of the Des Moines, Northern & Western Railroad Company for the purpose of consolidating the line of the latter company with its own line of railroad.

At the annual meeting of the stockholders of the Des Moines, Northern & Western Railroad Company held January 5, 1899 (ex. 219, vol. IV, p. 1498), the board of directors elected consisted of W. G. Collins, A. J. Earling, C. A. Goodnow, Burton Hanson, F. M. Hubbell, F. C. Hubbell and P. M. Myers, all of whom, except the two Hubbells, were officers of the Chicago, Milwaukee & St. Paul Railway Company.

At a meeting of the board of directors of the Des Moines, Northern & Western Railroad Company held in Chicago on April 24, 1899, at which were present the members of the board of directors above named, except the two Hubbells (ex. 220, vol. IV, p. 1499), there was laid before the board of directors a proposition made by the Chicago, Milwaukee & St. Paul Railway Company looking toward the consolidation of the property of the two companies, a part of such resolution being as follows (p. 1503) :

"Resolved, that the Des Moines, Northern & Western Railroad Company be, and is hereby requested to sell and convey to this Company all its railroad and property and for this purpose to make, execute and deliver, through its proper officers, a good and sufficient deed of conveyance, conveying and transferring to this Company all its railroad and property of every name and nature, wheresoever situated, and all its rights, franchises, licenses, privileges and immunities of every kind, howsoever derived, in consideration of the sum of One Dollar and of the cancellation and surrender by this Company of all the above mentioned mortgage bonds of the Des Moines, Northern & Western Railroad Company, amounting in the aggregate to the sum of \$2,933,000, with the interest due thereon, and of the payment of all other lawful debts of said Company; and this Company

hereby agrees that, upon the delivery to it of such deed, it will cancel and surrender the said mortgage bonds and will assume and pay all other lawful debts of said Des Moines, Northern & Western Railroad Company, and hold said Company free and clear and harmless therefrom."

Upon consideration of this proposition, the directors of the Des Moines, Northern & Western Railroad Company passed a resolution accepting this offer and calling a meeting of the stockholders for the purpose of considering it (p. 1504). It will be noted that this proposition of the Milwaukee was to acquire all the property of the Des Moines, Northern & Western Railroad Company of whatever character. This stockholders' meeting was held on May 8, 1899 (ex. 222, vol. IV, p. 1508). At this meeting the stockholders authorized the transfer of the property of the Des Moines, Northern & Western Railroad Company to the Milwaukee Company, and authorized the execution of a deed transferring the same, a part of which reads as follows (p. 1512) :

"Whereas, the Des Moines, Northern & Western Railroad Company now owns and operates a certain line of railroad, commencing at the east line of Section Seven (7), Township Seventy-eight (78) North, Range Twenty-four (24) West, in the City of Des Moines, Polk County, Iowa, and thence extending in a general northwesterly direction, via Clive in said County, through the Counties of Polk, Dallas, Guthrie, Greene, Calhoun and Pocahontas, to Fonda in said last named County; and also a line of railroad extending from Clive, in said County of Polk, through said County of Boone, in the County of Boone; said lines of railroad hav-

ing an aggregate length of about one hundred and fifty miles, all in the State of Iowa;

• • • • • • • •
*and also one-fourth interest in the capital stock of
the Des Moines Union Railway Company."*

The east line of section 7 referred to in this deed was coincident with the west city limits of the City of Des Moines at that time and what is now known as Twenty-eighth Street, which is approximately a mile west of what was formerly known as Farnham Street and now known as Sixteenth Street. This was the form of the deed approved by the stockholders of the Des Moines, Northern & Western Railroad Company in carrying out the proposition to transfer to the Milwaukee Company all its property, and shows clearly that at this time no claim was made that that company owned any interest in the terminal property other than that represented by its stock. This deed was executed as authorized, delivered to the Chicago, Milwaukee & St. Paul Railway Company, and filed for record (ex. 74, vol. II, p. 673).

As above noted, this deed from the Des Moines, Northern & Western Railroad Company to the complainant, the Milwaukee Company, described the line of road as commencing at the east line of section 7, whereas, all former transfers and mortgages of the property had described it as commencing at Farnham Street. To correct this error in the description, a special meeting of the stockholders of the Des Moines, Northern & Western Railroad Company was held on June 12, 1907 (ex. 75, vol. II, p. 678). This was more than eight years after the execution of the deed last above referred to, during which eight years the Chi-

cago, Milwaukee & St. Paul Railway Company had had two representatives on the board of directors of the defendant company.

At this meeting a resolution was passed reciting the fact that by the transactions of 1899 heretofore referred to, it was the intention to transfer to the Milwaukee Company all the railroad and property of the Des Moines, Northern & Western Railroad Company "of every name and nature, wheresoever situated, and all its rights, franchises, licenses, privileges and immunities of every kind, howsoever derived," and re-citing the fact that through some error or oversight the deed described the property as commencing at a point on the east line of section 7, instead of "Sixteenth Street (formerly called Farnham Street), in the said City of Des Moines," and then states:

"Now, Therefore, Be It Resolved, that for the purpose of correcting such error and carrying out the purpose and intent of this Company to convey to the said Chicago, Milwaukee & St. Paul Railway Company its *entire* property as aforesaid, the President and Secretary of this Company be required and directed to execute and deliver to the Chicago, Milwaukee & St. Paul Railway Company, a deed in due form of law, of that part of the said tracks and right of way omitted as aforesaid, to-wit: That part of said tracks, right of way and fixtures between the said Sixteenth Street (formerly called Farnham Street) and the said Western Avenue or Twenty-eighth Street, inclusive, in the said City of Des Moines."

In pursuance of this resolution a correction deed was executed, delivered and recorded (ex. 76, vol. II, p. 680).

If the complainants, as successors of the three railroads parties to the contract of January 2, 1882, are the real owners of the terminal property, and the title thereto is simply held by the defendant company in trust, or if they have an easement in the property which entitles them to the use and occupation thereof in perpetuity for railway purposes, or any other interest therein except as represented by the capital stock in the defendant company owned by them, it is singular that no such thought is contained in the deeds by which the property was transferred to the terminal company, and it is singular that in the various transfers and mortgages of these properties through which complainants trace their title, no reference is made to such an interest in the terminal property, and it is singular that wherever in these transfers or mortgages any reference is made to their interest in the terminal property, it is always referred to as that of owners of the capital stock in the defendant company.

The necessary and legitimate inference is that from May 1, 1888, up to the time of the commencement of this suit, none of the parties suspected that the defendant company did not have an absolute title to this property. The various parties to these transactions were the ablest lawyers and shrewdest business men among those who for many years had carried on the largest enterprises in the Middle West, and this record shows that during all these years in these various instruments they have with the greatest care particularly described the properties in which these various companies have been interested, and all of them have been drawn upon the theory that the terminal property was the absolute property of the defendant company.

**THE NEGOTIATIONS WITH RESPECT TO A RE-
NEWAL OR EXTENSION OF THE TERMINAL
CONTRACT OF MAY 10, 1889.**

By the year 1896 there had come a change in the situation. The railroad companies, original parties to the contract of May 10th, 1889, were no longer operating the railways and were either dead or in a dying condition. Their successors, the Wabash Company and the Des Moines, Northern and Western, had come into the contract arrangement apparently as a matter of course, but some of the parties interested doubted that these companies were bound by the contract. This doubt somewhat discredited the bonds of the Des Moines Union Company on the market and as the Wabash was a holder of these bonds and wanted to dispose of them, it wanted that doubt removed.

So, on December 26, 1896, Mr. Ashley, as President of the Wabash, wrote to Mr. Hubbell, as Secretary of the Des Moines Union, as follows (Rec., vol. IV, p. 1673):

“Permit me to remind you of our understanding to the effect that you would have prepared at once a new agreement for the tenant companies of the Des Moines Union Railway Co. to sign; this new agreement being considered necessary on account of the foreclosure of the Des Moines & Northwestern. I understand that the agreement will be exactly as before, except that the time must be made to correspond with the life of the bonds, or to be made for a period to extend beyond their maturity.

I write now for the purpose of urging the immediate preparation of this agreement, as without it we cannot well dispose of our bonds. When it is ready please forward it to Colonel Blodgett, asking him to examine the same and to send it to me

as soon as possible. I should not suppose it would take long to have the agreement prepared and as time in this case is of importance I hope you will see that the paper is gotten under way at once. Perhaps you have already taken the matter in hand and if so, so much the better."

Mr. Hubbell took up the matter at once with Mr. Cummins, who in turn entered into correspondence with Colonel Blodgett. Various changes were proposed and discussed upon the one side and the other, and the outcome was the contract of July 31st, 1897, called the Ratification Agreement (Rec., vol. II, p. 506).

This, it will be seen, followed substantially the suggestion of Mr. Ashey that "the agreement will be exactly as before."

The agreement recites the contract of 1889 and annexes a copy. It notes the passing from the scene of the old railroad companies and that the successor companies had both been using the terminal property and had recognized the contract of 1889 as binding upon them and then proceeds:

"Whereas, it has been doubted whether the said contract is legally binding upon the said Wabash Company and the said Des Moines, Northern & Western Company;

"Now, Therefore, in consideration of the premises and for the purpose of removing all doubt with respect to the said subject, it is now agreed by and between the parties hereinbefore named, that the said contract, a copy of which is attached, shall be and become binding and obligatory upon said Wabash Company and the Des Moines, Northern & Western Company."

There follow stipulations, first by the Wabash and then by the Des Moines, Northern and Western, that the Company will make the payments provided with respect to its railroad, and that when it ceases to operate its road, its obligation under the contract shall cease and pass to its successor company.

It was also provided that so much of the contract of 1889 "as relates to the issuance and distribution of the capital stock of the said Des Moines Company (the terminal) is no longer binding, and that the capital stock of the said Des Moines Company is as follows:

The Purchasing Committee of the
Wabash, St. Louis and Pacific
Railway Company 500 shares,
The Des Moines, Northern and
Western Railroad Company 1,000 shares,
F. M. Hubbell & Sons 2,500 shares."

There follows a statement of a few qualifying shares for directors which we need not consider.

This agreement was made at the instance of the Wabash Company and it was a party thereto, and the Des Moines, Northern and Western, predecessor of the Milwaukee, and on whose Board of Directors the Milwaukee then had three members, was also a party, and as we shall show, the Milwaukee must have known and did know all about the Ratification Agreement and hence of the agreement of 1889.

And here again the ownership of the terminal property of the Des Moines Union and the relation of the other companies to it as tenants were fully recognized.

It will be remembered that in 1898 the Milwaukee Company acquired all the outstanding stock and bonds of the Des Moines, Northern & Western Railroad

Company. A portion of this stock and bonds was purchased of the defendant, F. M. Hubbell & Son (exs. 413, 414, vol. IV. pp. 1759-90). According to these letters, the sale of these bonds and stock was to be closed up on the 6th of December, 1898. On December 2, 1898, Mr. Miller, President of the Chicago, Milwaukee & St. Paul Railway Company, wrote to Mr. Hubbell the following letter (ex. 418, vol. IV, p. 1765) :

“I observe that the contract between the Des Moines Union Railway Company and the Des Moines, Northern & Western Railroad Company is only for 20 years. I think it should be for 50 years. Have you any objection to extending it for so long?”

In carrying out the agreement to sell to the Milwaukee these bonds and stocks, Mr. Miller met Mr. Hubbell in New York, December, 1898, and there requested Mr. Hubbell to agree that the defendant company would extend to the Des Moines, Northern & Western the operating contract of May 10, 1889, for 100 years (testimony of F. M. Hubbell, vol. III, pp. 1023-4). With respect to it, Mr. Hubbell testified (near the top of page 1024) :

“He was ready to buy our bonds and stock if I would write him a letter that the Des Moines, Northern & Western Railroad Co. should give him a contract with the Des Moines Union the same as the present contract for one hundred years. He pressed me hard to sign such a letter, I refused and told him that I would come back to Iowa and see if we could get him a contract extending the contract of July 31st, 1897.”

This testimony of Mr. Hubbell's is corroborated by a letter which Mr. Hubbell on that day wrote to his brother-in-law, H. D. Thompson, and to his son, which appears as defendants' exhibit 421 (vol. IV, p. 1767).

As a result of this request on the part of Mr. Miller, a contract was prepared by Mr. Cummins, which appears as defendants' exhibit 430 (vol. IV, p. 1772). In this contract it was recited that the defendant company owned and operated the terminal company. This contract was submitted to Mr. Miller and to the general counsel of the Milwaukee Company, George R. Peck, but the same was never consummated because there were some provisions in the contract upon which they could not agree, but no question was ever raised as to the correctness of the recitations in the contract to the effect that the terminal property was owned by the defendant company.

From time to time thereafter attempts were made by the defendant company on the one hand, and the complainants on the other, to agree upon a new terminal contract, but they were unsuccessful, not because any question was ever raised about the absolute ownership of the terminal property by the defendant company, but because they were unable to agree upon the compensation which was to be paid by the complainants for the use of the terminal. (See vol. IV, exs. 454 (p. 1800); 455 (p. 1801); 456 and 457 (p. 1802); 458 and 459 (p. 1803); 460 (p. 1804); 466 and 467 (p. 1807); 468 (p. 1808); 471 (p. 1810); 479 (p. 1818); 480 (p. 1819); 481 (p. 1820); 484 (p. 1822); 485 (p. 1823); 486 and 487 (p. 1825); 488 (p. 1826); 492 (p. 1828); 493 (p. 1829); 494 (p. 1830); and 495 (p. 1832).)

In addition to this, the defendant company from time to time entered into contracts with other railway

companies, by which it agreed to furnish such other railway companies terminal services. These agreements are, one with the Chicago, St. Paul & Kansas City Railway Company (ex. 524, vol. IV, p. 1871), one with the Chicago Great Western Railway Company (ex. 526, vol. IV, p. 1879), one with the Iowa Central Railway Company (ex. 526a, vol. IV, p. 1894), one with the Chicago, Burlington & Quincy Railroad Company (ex. 527, vol. IV, p. 1901), one with the Des Moines, Iowa Falls & Northern Railway Company (ex. 528, vol. IV, p. 1911), and one with the Des Moines & Fort Dodge Railroad Company (ex. 529, vol. IV, p. 1920).

In each one of these contracts the terminal property is described as being owned by the defendant company, in almost the identical language that is used for that purpose in the contract of May 10, 1889, with the complainants' predecessors. Each one of these contracts was approved by directors of the defendant company who represented complainants and their predecessors upon the board of that company, because the articles of incorporation of the defendant company provide that no such contracts can be made unless they are approved by the unanimous vote of the board of directors. In fact, no question was ever raised after May 1, 1888, up to the time of the commencement of this suit in 1907, with respect to the ownership of this property by the defendant. It is impossible to find a single word in this record to show that complainants or their predecessors at any time between those two dates ever claimed to have any interest in the terminal property of any kind or character, except the interest which is represented by the stock which they hold, and the record is full of contracts, deeds, resolutions, letters and other transactions recognizing the ownership

of the defendant by the plaintiffs and their predeces-
NOTE.

So far we have discussed this case for the purpose of ascertaining the intent of the parties by the transactions which resulted in the transfer of the title, ownership and possession of the terminal property to the defendant company in the year 1888. We will now go to another phase of the case, but in doing so we do not wish to be understood as thinking we have at all exhausted the subject of intent. To exhaust this subject we would have to refer to every item of evidence contained in this long record, because there isn't a thing in the record from the time of the original inception of the terminal company down to the bringing of this suit, which does not evidence the intent to give to the defendant company a perfect title to the property. The things to which we will call attention in subsequent divisions of our argument will all bear upon the question of intent, as well as upon other phases of the case which we will discuss.

II.

THE AMENDMENT TO THE ARTICLES OF INCORPORATION OF THE DES MOINES UNION RAILWAY COMPANY ENACTED APRIL 8, 1890, AND THE RESOLUTION PASSED BY THE STOCKHOLDERS AT THAT MEETING.

Brief reference has heretofore been made to these amendments and resolutions, and the court no doubt understands in a general way their nature. It will be remembered that of those who were present at this meeting, James F. How, Vice-President of the Wabash Company, Charles M. Hays, General Manager of the

Wabash Company, and F. M. Hubbell, Secretary of the defendant company, were active in the transactions of 1884, 1887 and 1888, in which the title and ownership of the terminal property were transferred to the defendant, and knew what was thereby intended; and these amendments and the resolutions clearly show that it was understood by these persons and the others who were present at the meeting, that it was intended by the transactions heretofore referred to, to vest in the defendant company an absolute title to the property. But upon this phase of the situation we need not enlarge at this time.

If the court, in view of the facts to which we have heretofore called its attention, believes that the result of the transactions which culminated in the surrender of the property to the defendant company on May 1, 1888, was to vest in the terminal company a good title to the property, the amendments to the articles of incorporation above referred to are not of great importance, but if there is any lingering doubt in the mind of the court as to the nature of defendant's title, then a consideration of these articles and resolutions becomes important for the reasons which we will hereafter point out.

It is the claim of complainants, as we understand it, that notwithstanding the fact that the defendant company was organized as a corporation for pecuniary profit for the purpose of acquiring, owning and operating the terminal property, and notwithstanding the fact that by the resolutions of 1884 the three railway companies who, plaintiffs claim, were the beneficial owners of the property, authorized the transfer of the ownership thereof to the defendant company, and notwithstanding the fact that the resolutions of 1887 author-

ized the trustees to transfer the property to defendant without any reservations, upon being paid the agreed purchase price therefor, and notwithstanding the fact that the Des Moines & St. Louis Railroad Company executed and delivered to the defendant company a warranty deed to the property, and notwithstanding the fact that the St. Louis, Des Moines & Northern Railway Company executed and delivered to the defendant company an absolute deed to the property without reservations, and notwithstanding the fact that How and Dodge executed deeds to that portion of the property standing in their names, without any reservations, and notwithstanding the fact that the defendant paid to the parties entitled thereto the purchase price agreed upon, and notwithstanding the fact that from May 1, 1888, down to the commencement of this suit, every person and corporation connected with the transaction treated the property as the absolute property of the defendant company; yet by reason of the fact that there was incorporated as a recitation in the original articles of incorporation of the defendant company a copy of the contract of January 2, 1882, and an attempt made in articles 2 and 4 of defendants' articles of incorporation to limit the power of the defendant to alienate the property, and by reason of certain references to the contract of January 2, 1882, in the resolutions of 1887, the defendant company acquired the title to the property in trust only and for the benefit of complainants' predecessors, or acquired the title subject to an easement in favor of complainants' predecessors to use the property in perpetuity for terminal purposes.

Our answer to this contention is, if there is any question about the effect of the transactions resulting in the transfer of the property to the defendant company in

1888, that question was forever set at rest by the action of the stockholders of April 8, 1890. In other words, the effect of this action was to quiet the title to the property in the defendant company, if theretofore there was any question about the title.

For the convenience of the court, we here set out in parallel columns the sections of the original articles of incorporation upon which complainants base their claim, and the corresponding articles as amended on April 8, 1890 (vol. II, p. 489), also sections ratifying the purchase of the terminal property, and the section striking from the original articles of incorporation the contract of January 2, 1882:

ORIGINAL.

"Article 2.

The general nature of the business to be transacted shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of depots, freight houses, railway shops, repair shops, stock-yards and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Ia., as well as the transfer of cars from the line or depot of one railway to an-

AMENDED.

"Article 2.

The object of the corporation and the general nature of the business to be transacted shall be the purchase, lease, construction, ownership, maintenance and operation of a system of railway in, around and about the City of Des Moines, Polk County, Iowa, including the construction, purchase, ownership, maintenance and use of a union depot, depots, freight houses, railway shops, repair shops, stock yards and whatever other things may be useful or convenient for the operation of

other, or from the various manufactories, warehouses, store-houses, or elevators to each other or to any of the railways or depots thereof, now constructed or to be hereafter constructed, in or around said City of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by Chapter I, of Title IX, of the Code, and the amendments thereto. All the powers exercised by this Company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882, by and between the Des Moines and St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Jas. F. How, Trustee, and Grenville M. Dodge. The said Company shall have the right to lease or otherwise dispose of the use of any part of its franchises to any other Railway Company—provided that the

railways at terminal stations, as well as the transfer and switching of cars from the line or depot of one railway to another, or from the various manufactories, warehouses, elevators or other source of traffic to each other or to any of the railways or depots thereof, now constructed or hereafter to be constructed in or around said City of Des Moines, and also to lease terminal facilities to and furnish and perform terminal services for all railways whose lines reach or pass through or near the said City of Des Moines, and the corporation shall possess all the power conferred upon railway corporations by the laws of the State of Iowa, including the power to condemn private property for its use.

assent in writing of the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company shall be necessary before any such lease or disposition can be made to any other than the parties above named.

Article 3.

The capital stock of this corporation shall be One Million (\$1,000,000.00) Dollars, which shall be divided into shares of one hundred (\$100.00) Dollars each, and shall be paid in at such times and in such manner as the Board of Directors may determine, and the Board are authorized to receive in payment therefor the property and franchises in the City of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Trustee, Jas. F. How and Grenville M. Dodge.

Article 3.

The capital stock of the corporation shall be two million dollars (\$2,000,000.00) which shall be divided into shares of one hundred dollars each; said shares shall be paid for and issued in the manner following and not otherwise; four thousand shares as a part of the purchase price of the terminal property originally acquired by the corporation, it being now agreed by all the stockholders that said sum of four hundred thousand dollars, together with the first mortgage bonds theretofore issued for that purpose constituting the fair value of said property when so acquired; and all resolutions and proceedings of

the corporation heretofore had with respect to the amount of capital stock to be issued as such purchase price, are set aside and held for naught.

Said four thousand shares of capital stock shall be issued to the following corporations and in the following proportions:

Two thousand shares to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company, successor in ownership to the Des Moines & St. Louis Railroad Company, and the present owner of the property known as the Des Moines & St. Louis Railroad.

One thousand shares to the Des Moines & Northwestern Railway Company, successor to the Des Moines Northwestern Railway Company, and

One thousand shares to the Des Moines & Northern Railway Company successor to the St. Louis, Des Moines & Northern Railway Company, and the said shares are hereby declared to be fully paid by the transfer of the

aforesaid property. The remaining capital stock, to-wit; sixteen thousand shares, or any part thereof, shall be issued only by the authority of a resolution of the stockholders adopted by the vote of more than seven-eighths of all the stock theretofore issued and shall be fully paid either in money or property at its fair market value, before certificates thereof shall be executed and delivered.

The stock shall be transferable only on the books of the Company by and with the consent of three-fourths of all the Directors except in case the transferee of the stock is, or becomes the owner of either of the railroad properties above mentioned, in which event the stock shall be transferable by right and without consent.

Article 4.

The affairs of the Company shall be managed by a Board of eight directors, who shall be elected annually, by the stockholders, on the first Thursday of January of

Article 4.

The affairs of the corporation shall be managed and its business conducted by a Board of Directors composed of eight persons, who shall be elected by the stockhold-

each year. The provisional Board of Directors, who shall hold office until the first Thursday in January, A. D. 1886, shall consist of Jas. F. How, A. L. Hopkins, A. A. Talmage, J. S. Runnels, J. S. Polk, F. M. Hubbell, G. M. Dodge, C. F. Meek.

Four members of the Board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St. Louis, Des Moines & Northern Railway Company, and no stockholders shall be eligible for membership of the Board unless so nominated.

The fact that a candidate has been duly nominated shall be certified to the Stockholders' meeting of this Company by the Secretary of one of the respective companies aforesaid and such certification shall be conclusive.

The provision herein with respect to nomination for the Board of Directors shall apply to and be enjoyed by any

ers at their regular annual meeting to be held at the office of the Company in Des Moines, Iowa, on the first Thursday of January of each year, and they shall hold their offices for one year and until their successors are elected and qualified, but at all future elections of Directors, it shall require the votes of more than seven-eighths of all the stock theretofore issued to elect any director.

The Board of Directors shall have the power to authorize the execution of mortgages, to issue bonds, to enter into contract, to purchase property, to construct buildings, to make leases, to authorize the institution of condemnation proceedings and to do all such other things as may be proper or necessary for the corporation to do, but with respect to the matters above mentioned and all other matters except the ordinary operation of the property, the Board of Directors can act only upon the unanimous vote of the eight members thereof, and in order to facilitate the transaction of business,

grantee or assignee of either of the railway companies aforesaid. No contract, lease, or other agreement, amounting to a permanent charge upon the property of the corporation, shall be entered into by the Board unless the same shall have been first approved by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company, or their assigns, and shall have been submitted to a meeting of the stockholders, duly called, and shall have been approved by more than three-fourths of all the stockholders; and it shall not be within the power of the Board of Directors to create any limitation whatsoever upon any of the franchises of the corporation, except the same shall have been submitted to and approved by the stockholders as hereinbefore provided.

The Directors shall elect, from their number, a President, Vice President, Secretary and

power is expressly conferred upon each of the Directors to delegate by written authority, some other person to act or vote for him, and in his stead.

Provided that such authority shall be filed with the Secretary at or before the time the meeting convenes.

The Board of Directors shall annually select an Executive Committee, but such selection must be made by the vote of at least seven members. The duties and powers of such Committee shall be defined in the By-Laws.

The Board shall elect the officers of the corporation hereinafter provided for and shall have the power to enact and publish by-laws not inconsistent herewith, but such officers must be elected and such by-laws enacted by the unanimous vote of the eight members of the Board. All vacancies occurring in the Board shall be filled by the stockholders at a special meeting in the manner heretofore provided for the election of Directors.

Treasurer. All vacancies arising from the death or resignation of a member of the Board shall be filled by the Board.

Article 14, as adopted April 8, 1890, is as follows:

“Article 14.

The purchase of the property heretofore conveyed to the corporation, the conveyance made in pursuance thereof, the execution of Trust Mortgage to the Central Trust Company of New York, dated February 28th, 1887, and recorded in the Recorder’s office of the County of Polk, State of Iowa, on the 21st day of May, 1888, in book 196 at page 525 and the issuance of bonds secured by the same are hereby approved, ratified and confirmed.”

Article 15, as adopted April 8, 1890, is as follows:

“Article 15.

The proceedings of a meeting held December 10, 1884, with certain preambles, including a contract executed on the 2nd day of January, 1882, between the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company, consented to by the Wabash, St. Louis & Pacific Railway Company, which now appears as part of the Articles of Incorporation of this Company, are hereby repealed, stricken out and expunged.”

As we understand it, it is the claim of complainants that these amendments were invalid and ineffective, for the following reasons:

1. Because at this time (April 8, 1890), no certificates of shares of stock had been actually issued by the defendant company, and therefore there were no stockholders who could amend the articles.
2. Because the persons who were present at the meeting and purported to represent the complainants' predecessors, had no authority to act for them.
3. That the amendment to the articles of incorporation and the passage of the resolutions referred to were the acts of the defendant company, and that such action by the defendant company could not affect any interest which complainants' predecessors had in the property.
4. That the published notice of the amendment of the articles is insufficient as to Article II. This objection is made for the first time in this Court.

Our contention is as follows:

- (a) The stockholders were the persons and corporations who were entitled to the stock of the defendant company under the articles of incorporation and contracts by which the defendant acquired title to the terminal property and the persons who were representing them. The issue of the actual certificates of shares of stock was not necessary in order to constitute them stockholders.
- (b) The stockholders had both actual and constructive notice of the meeting and the purpose thereof. The presumption is that the stockholders were lawfully represented at the meeting, and the evidence fails to overcome this presumption.

(e) That the adoption of the amendments and the resolutions were acts of the stockholders (acts of complainants' predecessors) as distinguished from the acts of the defendant corporation, and the plaintiffs and their predecessors were bound thereby.

(d) These amendments to the articles were properly signed, acknowledged and recorded and notice thereof was given as required by the Iowa statute. The complainants and their predecessors had both actual and constructive notice thereof. They carried on the business of the defendant corporation under these amendments for the period of seventeen years before the commencement of this suit, and are now estopped by their laches to raise the question of the validity of these amendments.

(e) The complainants acquired the stock which they hold in the defendant company long after the adoption of these amendments and the resolution referred to, and cannot now raise any question as to their validity.

(f) The adoption of these amendments and this resolution, and the acquiescence of the plaintiffs and their predecessors therein and the continuous conduct by them of the business of the corporation in accordance therewith for the period of seventeen years, is one of the strong grounds of estoppel urged by the defendants, the Hubbels, as against the complainants' right to a decree which would destroy the value of the 2,500 shares of stock which they own in the defendant company.

(g.) The published notice of the amendments was sufficient in every respect and in any event the amendments made are good as between the parties.

We will consider these grounds in their order:

(a) **AS BETWEEN THE STOCKHOLDERS AND THE CORPORATION, THE ISSUANCE OF A CERTIFICATE OF STOCK IS NOT NECESSARY.**

The general rule laid down by

Thompson on Corporations, 2d Ed., Vol. 4,
§ 3455,

is as follows:

"See. 3455. *Certificate merely a muniment of title*—Broadly speaking, a share certificate is merely the paper representative of an incorporeal right of a stockholder. It is nothing more than the symbol or paper evidence of a proprietary right. It stands on a footing similar to other muniments of title. In other words, the act of subscribing for the shares gives title to the subscriber, and the certificate neither constitutes nor is necessary to it; it is only evidence of title. The certificate transfers nothing from the corporation to the stockholder, but only affords him the evidence of his rights. • • • An original proprietor and subscriber for shares, having paid his installments thereon, has a complete title, though there has been no formal entry in the books of the corporation passing the stock to his credit. • • •"

"See. 3507. *Issuance of certificate not necessary to constitute relation of stockholder*—While a contract and an intention to assume the relation is necessary to make one a stockholder, the rule is that a certificate is not required to constitute this relation. It has been expressly held that, 'it is not essential that a certificate should have issued in order to create the relation of stockholder, provided a contract to take stock has been duly made, or provided the rights, privileges and emol-

ments of a stockholder had been enjoyed, with the consent of the corporation.' The certificate is not in itself property, but is merely the symbol or paper evidence of property, and the proprietary right may exist without the certificate. A person may acquire the rights and incur the liabilities of a shareholder, both to the corporation and to its creditors, although no certificate has in fact been issued. In other words, one who has subscribed for stock and fulfilled the annexed conditions, or one to whom stock has been apportioned, has all the rights of a stockholder, though no certificate has been issued to him. It follows that a subscription cannot be rescinded on the ground that certificates had not been issued to the subscriber. Among other things he may vote at corporate elections, and hold corporate offices. He has the power to transfer his stock, and to receive dividends, and is liable to assessment on his shares, and to creditors for the debts of the corporation to the same extent as though certificates had been issued to him. * * * The issuance of a certificate to a person and his receipt of the same raises the presumption that he owns the share."

This is the rule in Iowa.

First Nat. Bank v. Gifford, 47 Iowa 583.

"The former owner of the stock, Mr. Oehe, delivered the certificate held by him to Porter, and the stock was assigned by the former to the latter by means of what is termed a transfer ticket, and an entry thereof was made in the transfer book of the bank. No certificate was ever issued to Porter, and the Ochs certificate was cancelled, or at least the defendant does not claim that it was ever assigned to him.

It is useless to consider what would be the rights of the defendant if a certificate had been executed

to Porter, and by him assigned to the defendant, and no transfer entered on the books of the bank, for no such state of facts is presented by the finding.

As between Porter and the corporation, he was the undoubtedly owned of the stock. No certificate was required to perfect his title. It mattered not whether one ever was issued. He being the owner, and the bank not chargeable with notice of defendant's rights, Porter had the right to sell and transfer said stock, and the bank was bound to recognize his transferee as owner. Whatever title Porter had was obtained by Smith and Whitaker.

It seems to us that the transfer on the books of the bank was sufficient to make Porter's title full and complete. A stock certificate would be only additional evidence of his title, but it was by no means essential."

Morrow v. Gould, 145 Iowa, 4.

"It follows from the foregoing definitions that shares of stock represent an interest in the earnings and property of the corporation and that a certificate is not stock itself but only a convenient representation of it for one may be a stockholder without having a certificate issued to him."

In *Pendery v. Carleton*, 87 Fed. 41,

the rule is laid down by Thayer, Circuit Judge, as stated in the syllabus, as follows:

"A mining company contracted with complainant for the purchase of his interest in certain mining property, in consideration of a certain proportion of its capital stock, which stock, however, was never issued to him. Later, the board of directors, in good faith, order a sale of all the company's stock to pay the expenses of development, and pur-

chased it themselves, but without taking undue advantage of any other interested parties. Finally, the property, proving of little or no value for mining purposes, was sold—the sale being an advantageous one—and the proceeds divided among themselves by the directors, who believed themselves to be the only shareholders. On suit against the directors for an accounting, held, that complainant was the equitable owner of the agreed amount of stock, and was entitled to such proportion of the net proceeds of the sale as his stock bore to the total capital of the company, and no more, with interest from the date of filing the amended bill asking for such accounting."

This Court, in *Hawley v. Upton*, 102 U. S. 316, said:

"It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the corporation represents. If such an obligation exists, the courts can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made, or the obligation in some lawful way extinguished. These are elementary principles."

And in *Jellenik v. Huron Copper Mining Co.*, 177 U. S., the Court said, i. e. 13:

"The certificates are only evidence of the ownership of the shares, and the interest represented by the owner."

Applying the rule to this case, the St. Louis Des Moines & Northern Railway Company, the Des Moines & St. Louis Railroad Company and the Des Moines Northwestern Railway Company, by virtue of certain resolutions passed by the boards of directors of those companies and certain notices served on the Des Moines Union Railway Company in November, 1887 (exs. 11, 12, 13, 14 and 15, vol. II, pp. 435-443 incl.), became subscribers to the capital stock of the Des Moines Union Railway Company. The Des Moines Union Railway Company accepted these subscriptions by virtue of the action of its board of directors on November 8, 1887 (ex. 102, vol. II, p. 259). The three subscribers for this capital stock caused the same to be paid for by the execution of deeds (exs. 17, 18, 19, 20, 21 and 22, vol. II, pp. 446-59 incl.) and thereafter they, or their successors, were stockholders in the Des Moines Union Railway Company, although no certificates were actually issued until April 8, 1890.

It will be noted that the resolution of the Des Moines & St. Louis Railroad Company (ex. 12, vol. II, p. 437) authorized its proportion of the stock to be issued to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company.

While this resolution of the Des Moines & St. Louis Railroad Company may not of itself have bound the Purchasing Committee as stockholders, yet this action was ratified by the Purchasing Committee by selling and transferring a portion of the stock and accepting the issuance of the stock at the time it was issued in April, 1890.

And from the day of the incorporation of the company down to the last day to which this record recites

they and their successors acted consistently as the stockholders of the company.

(B) THE STOCKHOLDERS HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE OF THE MEETING AND THE PURPOSES THEREOF. THE PRESUMPTION IS THAT THE STOCKHOLDERS WERE LAWFULLY REPRESENTED AT THE MEETING, AND THE EVIDENCE FAILS TO OVERCOME THIS PRESUMPTION.

It was provided in the original articles of incorporation of the defendant company as follows (vol. II, p. 422):

“Article 9.

These Articles may be amended by a vote of more than three-fourths of all the stock in favor thereof, at a meeting of stockholders thereof, of which a notice containing the proposed amendments shall be mailed to each stockholder at his address, as disclosed by the transfer books of the Company. Notice of such proposed meeting shall also be given by publication for three successive weeks in some newspaper of general circulation—published in the City of Des Moines, Iowa.”

By the provisions of article 4 (p. 421), the annual meeting of the stockholders was fixed on the first Thursday of January of each year. At the annual meeting of the stockholders, held on January 3, 1890 (ex. 107, vol. IV, p. 1305), The Wabash Railroad Company and the Des Moines & St. Louis Railroad Company were present in the manner pointed out by the articles of incorporation, and nominated directors to represent those companies as provided by said articles.

Likewise, the Des Moines & Northwestern Railway Company and the Des Moines & Northern Railway Company were present and nominated directors representing those companies (p. 1306). At this meeting the following resolution was adopted (p. 1307) :

“James F. How moved that the question of amending the Articles of Incorporation of this Company as well as the question concerning the issuing of stock for the *purchase price* of the terminal property be referred to Attorneys W. H. Blodgett & A. B. Cummins for their investigation and recommendation.”

The meeting then adjourned to the 18th day of February, 1890. At this adjourned meeting on February 18, 1890, there were present in person F. M. Hubbell, L. M. Martin, F. C. Hubbell and A. B. Cummins, and by proxy G. M. Dodge, J. F. How, C. M. Hays and W. H. Blodgett. At this meeting the following record was made (ex. 109, vol. IV, p. 1311) :

“The secretary reported that notice of the meeting had been duly published and also reported that he had, pursuant to the articles of incorporation, notified each stockholder of the time, place and object of this meeting, which notice contained the amendments proposed to be offered to the articles of incorporation.

Upon motion of A. B. Cummins the report of the Secretary was adopted and this meeting declared to be duly and legally called, for the purpose of considering and adopting or rejecting amendments to the Articles of Incorporation.

Thereupon A. B. Cummins presented certain amendments to the Articles of Incorporation.

Thereupon F. M. Hubbell moved that the meeting of stockholders do now adjourn for the pur-

pose of having further opportunity to examine said amendments, to meet on Tuesday, the 8th day of April, 1890, at ten o'clock a. m., which motion being seconded, was unanimously carried and thereupon the meeting of stockholders adjourned to meet as aforesaid."

The record of the second adjourned meeting of the stockholders of the defendant company, held on April 8, 1890, appears as plaintiff's exhibit 28 (commencing on p. 488, vol. II). A portion of said record is as follows (p. 489):

"There were present in person:

J. F. How,	representing One Share
C. M. Hays,	representing One Share
F. M. Hubbell,	representing One Share
L. M. Martin,	representing One Share
F. C. Hubbell,	representing One Share
A. B. Cummins,	representing One Share

There were present by proxy:

G. M. Dodge, by L. M. Martin, representing One Share.

W. H. Blodgett, by J. F. How, representing One Share.

There were also present the Des Moines & Northwestern Railway Company, successors to the Des Moines Northwestern Railway Company, by F. M. Hubbell, President.

The Des Moines & Northern Railway Company, successor to the St. Louis, Des Moines & Northern Railway Company, by A. B. Cummins, Vice-President.

The Des Moines & St. Louis Railroad Company by J. F. How, President.

J. F. How, President, presiding.

Thereupon, by an examination of the records and the books of the Company, it was determined that all the stockholders of said Company were

present either in person or by proxy duly filed with the Secretary of the Company."

The rule of law with reference to the presumptions indulged in favor of the recitations contained in a corporate record is so well settled that we do not need here to do more than call to the attention of the court the authorities cited in that portion of our brief devoted to this subject. Applying that rule to this record, it appears:

1. That this meeting was duly and legally called.
2. That due and legal notice of the proposal to amend the articles of incorporation of the defendant company, as the same appear to have been amended at this meeting, was given to all the stockholders of the company.
3. That all of the stockholders of the defendant company were present or represented at this meeting.
4. That the articles were amended as provided by the resolution passed at that meeting, and the officers and directors of the corporation were duly authorized to execute said amendments and give notice thereof as provided by the statutes of Iowa.

Other facts bearing upon the regularity of this meeting and the notice and knowledge of the stockholders with respect thereto, and the carrying out of the resolutions by the proper execution and filing of said amendments, will be referred to in the division of our brief relating to the acts of the parties under said amendments.

THE ADOPTION OF THE AMENDMENTS AND RESOLUTIONS WERE ACTS OF THE STOCK-HOLDERS (ACTS OF COMPLAINANTS' PREDECESSORS), AS DISTINGUISHED FROM THE ACTS OF THE DEFENDANT CORPORATION, AND THE COMPLAINANTS AND THEIR PREDECESSORS WERE BOUND THEREBY.

It is the claim of petitioners, as we understand it, that even assuming the meeting of April 8, 1890, was properly called and organized, and that all the stockholders were present and represented, yet the act of amending the articles of incorporation was the act of the defendant corporation, and that the defendant could not thereby change the relations they claim theretofore existed between their predecessors and the defendant company with respect to the property in question; that is, they say that by reason of the transactions which resulted in transferring the property in question to the defendant, the title of the defendant was merely that of a trustee for the benefit of their predecessors, who were the beneficial owners, and the defendant could not by this action affect the interest of *cestuis que trustent*.

The error in complainants' theory grows out of a misconception of the function and effect of the adoption of the amendments to the articles of incorporation and the failure to distinguish between the effect of the action of a corporation and the action of its stockholders. It is true, of course, that a corporation cannot by its own action affect its relations or contracts with third parties without the consent of such third parties, except in so far as such action may be urged by way of estoppel. But the acts of the stockholders of April 8,

1890, were not the corporate acts of the defendant company within the meaning of this rule. They were rather the acts of complainants' predecessors, who were the stockholders in defendant company and who, the complainants claim, owned the beneficial interest in the property. This thought must be perfectly clear when we come to consider the nature of articles of incorporation and the transactions of stockholders of a corporation.

When two or more persons get together to organize a corporation under the laws of Iowa, the act of such persons is their individual act and not at all the act of the corporation about to be organized. By adopting their articles they make a contract between themselves and between the corporation and themselves, and between the corporation and the state. In making this contract they reserve the power to amend these articles of incorporation; that is, they reserve the power to change the terms of this contract at their own volition and without consulting the corporate entity, and when they meet, as provided by the terms of their contract, and change the contract by amending the articles, such act is of their own volition and without consulting the corporate entity.

The rule with relation to the nature of articles of incorporation is laid down in

Thompson on Corporations (2d Ed.), Vol. 1, sec.
172,

as follows:

"Articles of association on the one hand may be said to constitute the contract of association between the stockholders, at the same time defining

the character and extent of the business in which the corporation shall engage, while on the other hand the general laws constitute the grant from the state, to those organizing the corporation, of the franchise or right of organizing the corporation and accomplishing the purposes agreed upon."

Again, the same authority, in section 312, lays down the rule:

"It is now universally conceded that the charter of a corporation is a contract. It is also very generally conceded that the charter is a contract in different aspects: (a) it is a contract between the state and the corporation; (b) between the state and the stockholders; (c) between the corporation and the stockholders; (d) between the state and third persons who have dealt with the corporation on the faith of the terms of the grant; (e) between the stockholders themselves."

In the case of

Jones v. Electric Co., 144 Fed. 756 (C. C. A.),

Judge Sanborn lays down the rule as follows (p. 770):

"The relation of a stockholder to his corporation, to its officers and to his co-stockholders is one of contract and of confidence. By the acceptance of his shares of stock, he agrees to assume the liability and to discharge the duties imposed upon a stockholder by the law. The statutes, charter and the by-laws of the corporation, as well as the settled law of the land at the time he takes his stock are read into and become a part of his agreement. The provision of the statutes of Missouri that a manufacturing corporation might be consolidated with another corporation whose objects and business were of the same nature upon the consent of

three-fifths of the owners of its stock was a part of the agreement of the complainant and a consolidation made by the officers and owners of the requisite amount of the stock of his corporation by the faithful exercise of the powers thus granted was neither void in itself nor voidable at his option because it was but the performance of the agreement which he made with them."

The Supreme Court of Iowa, in the case of

Heald v. Owen, 79 Iowa 25,

lays down the rule:

"The articles of incorporation were adopted long before the indebtedness to the bank was contracted and the rights of the parties, as between themselves, were fixed by the articles of incorporation, at least from the time they were adopted by the association. The articles of incorporation were not recorded as required by section 1060 of the code and it is claimed that for this reason the stockholders are liable for the debts of the association. It is averred by the appellants that the articles of incorporation are of no validity whatever, but it is to be remembered that this is an action between stockholders. Their contractual relations as between themselves are to be found in what they adopted as their agreement. It was in writing and denominated 'articles of incorporation' and either signed or adopted by the stockholders."

Again the same court, in the case of

Traer v. Lucas Prospecting Co., 124 Iowa 112,

said:

"When a person becomes a shareholder in a corporation he assents to the transaction of the business expressly or impliedly authorized by its char-

ter and, therefore, if the charter authorizes the sale or other disposition of all of its property, he cannot complain."

Applying this rule to the case at bar, when the plaintiffs' predecessors organized the defendant, the Des Moines Union Railway Company, they entered into a contract between themselves, as well as with the corporation and with the state. By the terms of this contract the stockholders reserved the power to change the contract by means of changing the articles of incorporation in the manner pointed out in the articles themselves. By the act of the stockholders' meeting of April 8, 1890, the stockholders exercised this power to change the terms of this contract. They had the right to change the contract as between the stockholders themselves, as well as between the stockholders and the corporation, so long as such action did not conflict with any statutory provision of the state, and they had the right to do this without consulting the corporate entity, because such was the right obtained by the provisions of the original articles. The stockholders were bound by whatever changes they made in this contract, and by these changes in the contract they changed their existing relations with the corporation. It seems to us that the soundness of this proposition cannot be questioned.

Therefore, when they struck out article 2 of the original articles and adopted a new article 2, as shown by the record, they abandoned all that part of the original article 2 that was not contained in the substituted article, and therefore abandoned any claim with respect to the contract of January 2, 1882, which might have been made under the article as originally adopted; and by the adoption of articles 3 and 4 in place of the orig-

inal articles numbered the same, they abandoned any right to control the alienation of the property in controversy as provided in the original articles, and adopted a method of controlling the defendant corporation which consisted in requiring the election of directors to be made by a more than seven-eighths vote of the outstanding stock, and requiring that all major action of the board should be by unanimous vote; and by the adoption of articles 14 and 15 they ratified the purchase by the defendant of the property in controversy and abandoned any and all claims which could be made under the contract of January 2, 1882.

By the adoption of the resolutions appearing on pages 494 to 496 of volume II, these stockholders (complainants' predecessors) declared:

1. That the original agreement between them and the defendant corporation was that the defendant purchased the property in controversy "including the franchises incident thereto," at its fair value, payable partly in first mortgage bonds and partly in capital stock of the company.
2. That these bonds had been issued and received by the persons entitled thereto.
3. That there still remained to be paid the sum of \$400,000.00 upon said purchase price, which sum was to be paid in the capital stock of the defendant company.
4. They determined who was entitled to receive such capital stock.
5. That the articles of incorporation had been amended to conform to the true intent of the several parties.

6. They authorized the issuance of the capital stock which was to be issued as a part of the purchase price.

7. They modified and amended all prior proceedings so as to comply with the action at that time taken by the stockholders.

This action, as we have stated, was the action of the stockholders, the plaintiffs' predecessors. They had the right to make this contract changing the terms of the prior contract, and they had the right to do it without the assent of the defendant corporation, because they had reserved that right in the original contract. There was an adequate consideration for it and as we will hereafter show, they have ever since acted in pursuance of the amended contract (the amended articles of incorporation).

THESE AMENDMENTS TO THE ARTICLES WERE PROPERLY SIGNED, ACKNOWLEDGED, RECORDED, AND NOTICE THEREOF WAS GIVEN AS REQUIRED BY THE IOWA STATUTE. THE COMPLAINANTS AND THEIR PREDECESSORS HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE THEREOF. THEY CARRIED ON THE BUSINESS OF THE DEFENDANT CORPORATION UNDER THESE AMENDMENTS FOR THE PERIOD OF SEVENTEEN YEARS BEFORE THE COMMENCEMENT OF THIS SUIT, AND ARE NOW ESTOPPED BY THEIR LACHES TO RAISE THE QUESTION OF THE VALIDITY OF THESE AMENDMENTS.

We have already called to the attention of the court the corporate record in relation to these amendments,

and we will here content ourselves with referring to some of the evidence there is in the record showing both actual and constructive knowledge with respect to these amendments outside of the corporate record itself.

It will be remembered that at the annual meeting of the defendant company in January, 1890, the subject of the amendments was referred to Colonel Blodgett and to Mr. A. B. Cummins. The testimony of Mr. Cummins will be found commencing on page 1203 of volume III. The substance of his testimony on this subject is as follows (commencing p. 1206) :

"I never heard any suggestion from anybody connected with the property or the proceedings, that the Des Moines Union Railway Company was not the owner of the property referred to. This, however, does not cover the suggestions that I myself made to persons who were interested in these companies concerning the title to the property at the time I was engaged in preparing certain amendments to the articles of incorporation, and before that time. My answer is intended only to relate to suggestions made by other persons with whom I was connected, than myself.

The suggestions I made began very soon after I became the counsel for the Des Moines Union Railway Company, and while I cannot recall the dates or places, I know that I made them at the meetings of the directors, meetings of the stock-holders, and individually to everybody who was connected with the Des Moines Union Railway Company, or those companies which were then called the tenant companies. In order to answer the question intelligently, it seems to me it would be necessary for me to state the situation as I recall it, because that situation was the subject of repeated conferences and conversations with these

various representatives of these several companies.

In the first part of the year 1890, and before that but after I had become thoroughly familiar with the affairs of the Des Moines Union Railway Company, this is the way in which it was presented to me: First, as to the tenant companies, the Des Moines & St. Louis Railroad Company had practically passed out of existence. It was the owner of one-half of the capital stock of the Des Moines Union Railway Company at that time.

I am not pretending to repeat what I told the stockholders. I am stating the situation as it appeared then to me, and that situation I discussed with all the people connected with this company at various times, and it was that situation which led up to the proposition on my part to amend the articles of incorporation. I made that proposition, and the title to the property was one of the phases of the proposition. I have already said the Des Moines & St. Louis Railroad Company was practically out of existence. It was the nominal owner of one-half the capital stock in the Des Moines Union Railway Company, except as that title had passed to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company; and the original articles of incorporation specifically provided that certain interests were to nominate a certain number each of directors. The Des Moines & Northwestern Railway Company had purchased of the Purchasing Committee a one-fourth interest in the stock of the Des Moines Union Railway Company. It was in trouble, that is to say, it was finding great difficulty in making its revenue meet its expenses. Nobody knew what was ahead for that company. The St. Louis, Des Moines & Northern Railway Company was also the owner, from the beginning, as I remember it, of one-fourth interest in the stock of

the Des Moines Union Company; it likewise was on the verge of bankruptcy. It was impossible to predict with any certainty what would become of it or its interest in the Des Moines Union Company, and this situation presented, as I thought, a very serious question.

I knew at that time that negotiations were pending between Mr. Hubbell and the Purchasing Committee for the purchase of a part of the one-half of the capital stock then held by the Purchasing Committee. The Purchasing Committee seemed to be anxious to dispose of a portion of this stock, and looking forward to the conduct of the Company in the future, it seemed to me that readjustment of that phase of the articles of incorporation I have referred to was absolutely necessary. More than that, it was discussed among all these people, that, inasmuch as the project of the union depot had been brought into existence, it was hoped that all the railroads in Des Moines could be brought into these terminals; that it would be very wise to have it so arranged that each railroad that might come into the depot in the future might become the owner of one-eighth of the capital stock. I thought that hope or expectation could never be realized without an amendment to the articles of incorporation, as it is evident that it could not be. Moreover, the original articles provided for a capital stock of one million dollars, and as I understood these articles, that stock was to be issued as a part of the purchase price of the property. The articles had been subsequently amended so as to increase the capital stock to two million dollars, and in that amendment it was specifically provided that the board of directors might receive in payment for this stock the property which had theretofore been conveyed—speaking of theretofore, at the time I made these suggestions to the Des Moines Union Railway Company.

I was always somewhat opposed to issuing capital stock without consideration and I did not believe that the property was worth any such amount and that to issue it in that way would impose, if disaster should come, a liability upon its owners, and would frustrate in a measure the hope of getting into this Des Moines Union Railway Company as stockholders as many of the railroads entering Des Moines as could be brought in. This was the standpoint as viewed, I thought, by the stockholders; but from the standpoint of the Des Moines Union Railway Company the situation was even more complicated and unsatisfactory.

And now I come to the specific answer to the question that was put to me. The Des Moines Union Railway Company was ignoring entirely, as it seemed to me, both as to ownership and as to management, the contract out of which the Des Moines Union Railway Company grew, namely, the contract of 1882. It had abandoned the terms of the contract as to the title of the property and as to the method of operation and management.

I am testifying to the substance of what I told these people and told all of them. The Des Moines Union was ignoring the articles of incorporation which in themselves, as I thought then and said then, were inconsistent with the contract of January, 1882. I told them that the contract provided for a title of the property in trust for the three companies which had signed it and for the joint use and occupation limited by Farnham Street in the west part of the city, and the company was claiming to own and operate a property extending to the west border of the city, and in the contract the Des Moines & St. Louis Railway Company, the company that had really no active functions, was charged with certain management and control of the property, and the other companies were required to pay to it whatever sums they were

obliged to pay for the use of the property. And furthermore, the contract and the articles seemed to contemplate in certain very important matters that there should be a formal preliminary approval by three independent companies before it could take action.

The substance of it was that I said that in view of the original articles, in view of the conveyances that had been made to the Des Moines Union Railway Company of the property which was originally in the names of Gen. Dodge and Mr. How, both individually and as trustee, and possibly some in the name of one of these other companies, or both of them, and that the Des Moines Union Railway Company had paid in its bonds for the original outlay for this property and had provided in its articles for the issuance of capital stock for the remainder of the purchase price, if any, that it was imperative to clear up the title and get rid of any question of doubt respecting the ownership of the Des Moines Union Railway Company and its right to manage its own property. These were the reasons which led up to my suggestion that there ought to be an amendment to the articles of incorporation that would put this company beyond any question in the ownership and control of its property just as any other corporation would be, leaving the interests which had been created in favor of the Des Moines & St. Louis Railroad Company and the Des Moines Northern Railway Company and the St. Louis, Des Moines & Northern Railway Company to be represented by the stock as in the case of other corporations, and the only suggestion that I ever heard from anybody in all my connection with any of these companies regarding the title to the property was the suggestion that I made myself arising out of the circumstances that I have stated.

I prepared a draft of the amended articles of incorporation that were finally adopted April 8, 1890, and I wrote Col. Blodgett the letter of date January 22, 1890. (This is the letter in which Col. Blodgett is advised that the stockholders of the terminal company had referred the question of amendments to Col. Blodgett and Mr. Cummins. See volume III, p. 1210.)

Prior to April 8, 1890, the draft of the amended articles of incorporation as it was afterwards adopted, was submitted to Col. Blodgett as the representative of the legal department of the Wabash interests, --! I had a conference with him about it, and possibly more than one. I also discussed the matter with Mr. Hays (p. 311). I also wrote to Gen. Dodge about it in a letter dated January 27, 1890. (This is a letter in which Gen. Dodge was sent a copy of the proposed amendments, and in which it is stated that Mr. Hubbell was at first disposed to oppose the amendments. See p. 1211.)

These amendments were not suggested by Mr. Hubbell. They were entirely my own suggestion and came about in the way that I have already related. With regard to Mr. Hubbell's opposition, my recollection is that Mr. Hubbell—conservative then as now, never disposed to move very rapidly into the future—was opposed to my proposition, as I thought, without any good reason (p. 1212).

So far as I know, every interest in the terminal property concurred in and was in favor of the adoption of the amended articles before the meeting was held at which they were adopted. I was not aware of any opposition at all at that time. In fact, I know that they had all consented to it. In connection with the proposed amendments I had prepared a resolution, or series of resolutions, carrying out my general proposition, which had been submitted to all, I believe, who were interested in

the matter and was understood to be a part of the thing to be done at the meeting just as we understood the amendments were to be adopted. I do not remember who suggested the exact amount of four hundred thousand dollars. I only know that I had suggested that it ought to be a great deal less amount than two million dollars and ought to be an amount that could fairly be said to represent, together with the bonds, the value of the Des Moines Union Railway Company property at the time the company was organized in 1884.

During the discussion that preceded this meeting and at this meeting there was no suggestion by anybody that the Des Moines Union Railway Company was not to acquire the absolute title for this property for which it was issuing this stock and these bonds. On the contrary, everybody there knew the very purpose, or one of the purposes, for adopting the amended articles of incorporation was to remove all doubt or any doubt on that subject and to abrogate the contract of 1882.

I prepared the preambles and resolutions at my own suggestion. I did it because it was the next step to be taken to clear up the matters that I was endeavoring to clear up in the amendment to the articles of incorporation. I recited that these people were present because they were present, and my understanding was that the eight directors and the three companies owned all of the capital stock of the Des Moines Union Railway Company. Neither of the Hubbells had anything to do with the preparation of the resolution, nor the incorporation of any part of it, unless it were to furnish me with the information that was necessary in order to draft it. I recall in this connection that between the time the resolution was passed for the preparation of amendments to the articles and this meeting to which you have just referred, the Purchasing Committee had sold a portion of the stock of the Des Moines Union Railway Company

to Mr. Hubbell and, as I remember it, a portion of it to General Dodge.

All of the persons who are recited to have been present upon that occasion had information from me with regard to the articles of incorporation, the amendments to the articles of incorporation and the resolution to which reference has been made, and in addition to those who were present, Col. Blodgett had information of these things from me, and General Dodge had information of these things from me, and my recollection is that Mr. Ashley also had information from me.

There was no attempt to conceal the transaction. On the other hand, as far as I was concerned, I made every possible effort that everybody connected with the whole matter should be fully and completely informed, and I drew the resolutions as specific as they are and as long as they are in order that there could be no possible controversy about it."

On cross examination Mr. Cummins testified on this subject (p. 1237) :

"I suggested that the articles of incorporation should be amended months before I knew that Mr. Hubbell was negotiating for any stock or that he had any idea of buying any part of the stock, as I now recall it."

There is no testimony to contradict that of Senator Cummins as to the manner in which the subject of the articles arose and the publicity of the matter, or as to the fact that everybody was consulted and thoroughly informed with respect thereto, but on the contrary all the evidence corroborates his testimony.

There are a few other significant facts shown by the record to corroborate the theory that the stockholders

and parties interested in the corporate affairs of the terminal company had proper notice of the proposed amendments to the articles of incorporation and consented thereto and acquiesced therein.

It will be noted that article 4 of the original articles of incorporation of the terminal company (exs. 5½ and 6, vol. II, p. 421), which provides for the election of directors, contained the following provisions:

“Four members of the Board shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two members by the Des Moines Northwestern Railway Company and two members by the St. Louis, Des Moines & Northern Railway Company, and no stockholders shall be eligible for membership of the Board unless so nominated.

The fact that a candidate has been duly nominated shall be certified to the Stockholders' meeting of this Company by the Secretary of one of the respective companies aforesaid and such certification shall be conclusive.”

This is a very peculiar and unusual provision in relation to the election of directors. It appears that the first meeting of the stockholders of the terminal company for the purpose of electing directors, so far as is shown by the record, was on March 31, 1888 (ex. 26, vol. II, p. 476). At this meeting James F. How nominated four directors on behalf of the Wabash Company and the Des Moines & St. Louis Railroad Company and the Wabash Western Railway Company; F. M. Hubbell nominated directors on behalf of the Des Moines Northwestern Railway Company, and G. M. Dodge nominated directors on behalf of the St. Louis, Des Moines & Northern Railway Company. These directors so nominated were elected.

The next annual meeting of the stockholders of the terminal company was held on January 8, 1889, and a like proceeding was had; A. B. Cummins nominated four directors on behalf of the Wabash Company and the Wabash Western Railway Company; Mr. Hubbell nominated two directors on behalf of the Des Moines & Northwestern Railway Company, and L. M. Martin nominated two directors on behalf of the St. Louis, Des Moines & Northern Railway Company (ex. 106, vol. IV, p. 1304).

At the next annual meeting of the stockholders of the terminal company, held January 3, 1890 (ex. 107, vol. IV, p. 1305), a like proceeding was had.

We quote from the record as follows:

*** * * J. F. How on behalf of the Wabash Railroad Company operating the Des Moines & St. Louis Railroad Company, nominated Jas. F. How, C. M. Hays, W. H. Blodgett and A. B. Cummins to be voted for as directors of the Des Moines Union Railway Company to represent the said Wabash Railroad Company, it having been certified to this meeting by the Secretary of the Wabash Railroad Company and Des Moines & St. Louis Railroad Company that the above named gentlemen had been duly nominated as candidates for directors in this Company on behalf of the Wabash Railroad Company, and the Des Moines & St. Louis Railroad Company."

A like record was made with respect to nominations by G. M. Dodge on behalf of the Des Moines & Northern Railway Company and by F. M. Hubbell on behalf of the Des Moines & Northwestern Railway Company.

It will, therefore, be noted that down to this time this peculiar method of nominating directors was followed.

The amendments to the articles of incorporation of the terminal company adopted April 8, 1890, changed the method of nominating directors and provided the usual method in that respect. (See article 4 of the amendments to the articles of incorporation, ex. 303, vol. IV, p. 1604.)

At the next annual meeting of the stockholders of the terminal company, held February 11, 1891 (ex. 115, vol. IV, p. 1318), no certificates of these various railroads were presented certifying the nomination for directors as was required by the original articles, but the various stockholders appeared in person or by proxy and the directors were elected as they are ordinarily elected at corporate meetings. At no time after the annual meeting, held on January 3, 1890, were any certificates of the secretaries of these railway companies presented certifying the nomination of directors as provided for in the original articles, but on the contrary at all meetings after that the ordinary and usual method was followed as provided in the amendments. The necessary conclusion from this is that all the railroads and all the stockholders knew of and acquiesced in and ratified the amendments to the articles of incorporation.

Again, as we have already shown, the Des Moines & St. Louis Railroad Company had authorized that portion of the stock that was coming to that company to be issued to the Purchasing Committee of the Wabash, St. Louis & Pacific Railway Company, which, upon acceptance of the stock, or acquiescence there in by the Purchasing Committee, constituted such Purchasing Committee stockholders in this company. It will be remem-

bered that prior to the adoption of these amendments to the articles, Mr. Hubbell and General Dodge had bought of the Purchasing Committee each one-eighth of the capital stock of the terminal company. One of the agreements in connection with this purchase (ex. 300, vol. IV, p. 1601), was that the articles of incorporation should be so amended as to permit one director of the terminal company to be nominated by any person or corporation holding one-eighth of the stock. At this time Colonel Blodgett was one of the directors nominated by the Wabash interests as representing it (ex. 107, vol. IV, p. 1306). At the conclusion of the meeting of April 8, 1890, at which the articles of incorporation were amended (ex. 28, vol. II, p. 496), the resignation of Colonel Blodgett as director was accepted and Mr. H. D. Thompson, a brother-in-law of Mr. Hubbell, was elected to fill his place. Undoubtedly this was done in pursuance of the agreement entered into with the Purchasing Committee, as heretofore stated, at the time it sold this stock to Mr. Hubbell and to General Dodge, and the necessary inference is that the Purchasing Committee was advised of this meeting, its purpose, and that the resignation of Colonel Blodgett was presented at the suggestion of such committee.

Again it is shown by complainants' testimony that Mr. How and Mr. Hays, both of whom were present at the meeting and voted for the adoption of these amendments, represented the Wabash interests, whatever they were (vol. II, p. 242).

Again it will be remembered that the authorized capital stock of the terminal company was \$1,000,000.00, which was raised to \$2,000,000.00 by an amendment adopted November 1, 1887 (vol. IV, p. 1298).

By the resolutions of January, 1885, and November, 1887, by which the transfer of the property to the terminal company was authorized, it was provided that as a part of the purchase price there should be issued all of the defendant's capital stock.

At a meeting of the board of directors of the Des Moines & St. Louis Railroad Company, held on April 8, 1890 (the same day on which the articles of the defendant company were amended), and at which were present James F. How, C. M. Hays, A. B. Cummins, F. M. Hubbell, H. S. Priest and George S. Grover, all of whom, except Mr. Hubbel, were either officers or attorneys of the Wabash Company, the following proceedings were had (ex. 185, vol. IV, p. 1434):

'C. M. Hays offered the following resolution and moved its adoption:

Whereas, the purchasing committee of the Wabash, St. Louis & Pacific Railway Company has sold to F. M. Hubbell one-eighth and to G. M. Dodge one-eighth of the stock of the Des Moines Union Railway Company, and

Whereas, the entire capital stock of said company owned by the company, issued as a part of the purchase price thereof, has been fixed at Four Hundred Thousand Dollars,

It is therefore now

Resolved, that the said sale by the said Purchasing Committee be and the same is hereby ratified, confirmed and approved by the Des Moines & St. Louis Railroad Company.'

How did the Des Moines & St. Louis Railroad Company ascertain that that portion of the purchase price of the terminal property which was to be paid in defendant's capital stock had been fixed at \$400,000.00? All of the proceedings prior to April 8, 1890, had pro-

vided that the capital stock to be issued in part payment of the purchase price was the full capital stock authorized by the defendant to be issued, which was originally \$1,000,000.00, and subsequently \$2,000,000.00. The only place where it was fixed at \$400,000.00 was at the meeting of the stockholders of the defendant company, held on April 8, 1890, and it must have been from this record that the Des Moines & St. Louis Company ascertained this fact. It therefore necessarily follows that the Des Moines & St. Louis Railroad Company had knowledge of the proceedings of the stockholders of the defendant company on April 8, 1890, by which the articles of the defendant company were amended, and the amount of the capital stock to be issued in part payment for the property was fixed at \$400,000.00.

On the same day there was issued to the Purchasing Committee of the Wabash Company, 1,000 shares of stock of the defendant company (less two shares of stock, standing in the name of directors), (ex. 79, vol. II, p. 711).

Bearing in mind that the resolutions of November, 1887, authorized the issuance to the Purchasing Committee of 15,000 shares of stock of the defendant company as a part of the purchase price, of what was the Purchasing Committee put upon its inquiry when it received this 1,000 shares of stock? This was adequate notice to the Purchasing Committee that some change had been made in the plan and it was up to the Purchasing Committee to make inquiry, and if it had done so it would have discovered the action of April 8, 1890, if it didn't already know about it.

At the annual meeting of the stockholders of the Des Moines Union Railway Company held February 11,

1891, which was the first annual meeting after the adoption of the amendments of April 8, 1890, there were present G. M. Dodge, James F. How, C. M. Hays, F. M. Hubbel, L. M. Martin, F. C. Hubbell and A. B. Cummins, all in person, and the Purchasing Committee of the Wabash Company by James F. How, proxy, the Des Moines & Northwestern Railway Company by F. C. Hubbell, vice-president, and the Des Moines & Northern Railway Company by G. M. Dodge, president (ex. 115, vol. IV, pp. 1318-9). At this meeting the following proceedings were had:

"The President stated the first business of the meeting to be the reading of the minutes of the previous meeting of the stockholders held during the year 1890, and the minutes of the directors' meetings and of the Executive Committee, and thereupon called upon the Secretary to read the same, which was done.

Mr. A. B. Cummins moved that the proceedings of the stockholders' meeting and the meetings of the board of directors and of the Executive Committee be approved. The motion was seconded and carried."

It will be remembered that certificates of stock had been issued prior to this meeting.

There was no controversy but that plaintiffs' predecessors were present at this meeting by their proper representatives, so at this time they were all advised of the amendments to the articles of incorporation of April 8, 1890, and the action was formally approved. An examination of the corporate records of the defendant company will disclose that from April 8, 1890, down to the time of the commencement of this suit the business of the defendant company was carried on under

the amendments of April 8, 1890, and no question was ever raised about their validity. (See vol. IV, commencing p. 1314.)

The amendments to the articles of incorporation as adopted April 8, 1890, appear as defendants' exhibit 303 (vol. IV, pp. 1604-10). They were signed and acknowledged by F. M. Hubbell, F. C. Hubbell, A. B. Cummins, Horace Seeley, L. M. Martin, Charles M. Hays, James F. How, Wells H. Blodgett, G. M. Dodge and H. D. Thompson (p. 1604), and were filed for record in the office of the county recorder of Polk County, Iowa, on April 23, 1890, and in the office of the secretary of state on May 12, 1890 (p. 1610), as required by the statute of Iowa.

Notice of these amendments was properly published as required by the statutes of Iowa (exs. 614-5, vol. IV, pp. 2010-1).

By chapter 88 of the acts of the twenty-second General Assembly (1888), in force on April 8, 1890, it was provided:

"That any of the provisions of the Articles of Incorporation may be changed at any annual meeting of the stockholders or special meeting called for that purpose; but said changes shall not be valid unless recorded and published as the original articles are required to be; and said changes in the Articles need only be signed and acknowledged by the officers of said Corporation."

By chapter 23 of the laws of the seventeenth General Assembly (1878), in force on April 8, 1890, it was provided:

"Previous to commencing any business, except that of their own organization, they must adopt articles of incorporation, which must be signed and

acknowledged by the incorporators, and recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor; the recorder must record such articles as aforesaid, within five days after the same are filed in his office, and certify thereon the time when the same was filed in his office, and the book and page where the record thereof will be found. The said articles and certificate of recorder shall be then recorded in the office of secretary of state, in a book kept for that purpose."

Section 1613 of the code of 1897 was in force on April 8, 1890, and provided for the publication of notice of the adoption of the articles of incorporation.

The purpose of this statute is to give to the world (which includes the stockholders), notice of the articles of incorporation and amendments thereto.

In the case of

Dempster v. Downs, 126 Iowa, 80,

the Court said:

"Every one who acquires certificates of stock must be assumed to know that they were issued by virtue of articles of incorporation, and that these may be found in the office of the Secretary of State. Indeed, the very object of requiring the filing and recording of the articles is to give them the same publicity, as nearly as may be, as statutory charters, and render them easily accessible to all who may be interested in ascertaining their contents. These articles are expressive of the relative obligations of the company and stockholders, and inhere in the certificates of stock, in whosesoever hands they may come."

If the provisions of the articles of incorporation and amendments stand upon the same basis and must be taken notice of by all the world, including the transferees of the stock, certainly the filing, recording and giving notice of the amendments is constructive notice of the provisions thereof to all stockholders.

In passing, we may call the court's attention to the fact that petitioners acquired their stock and whatever interest they have in this property long after the adoption of these amendments, and, therefore, come squarely within the doctrine of the above case, but of this we will have more to say at a later time.

Not only does the record show that complainants and their predecessors had actual and constructive notice of these amendments to the articles, but it is a presumption of law that all stockholders assent to any change in the articles of incorporation.

Holmes v. Loan Assn., 107 S. W. (Mo.) 1005.

Cook on Corporations, (6th Ed.) Vol. 2, sec. 503.

THE PUBLICATION OF THE AMENDMENTS.

The objection made by counsel to the sufficiency of the published notice of the Amendments is without validity. The Statute of Iowa, Code of 1897, Sec. 1613, requires the published notice of incorporation to show,

1. The name of the corporation and its principal place of business.
2. The general nature of the business to be transacted.
3. The amount of capital stock authorized and the times and conditions on which it is to be paid in.

4. The time of the commencement and termination of the corporation.

5. By what officers or persons its affairs are to be conducted, and the time when and manner in which they will be elected.

6. The highest amount of indebtedness to which it is at any time to subject itself.

7. Whether private property is to be exempt from corporate debts.

Sec. 1615 requires amendments to be published "as the original articles are required to be."

Article two of the Articles of Incorporation of the Des Moines Union, both original and as amended comes under the second head of Section 1613, "the general nature of the business to be transacted." As to this there was no change. It was and continued to be that of a terminal railway. The allusion to the contract of 1882 did not affect this. And this was expressly decided by the Supreme Court of Iowa in Morgan vs. Des Moines Union Ry. Co., 113 Iowa 561. The Court, l. c. 565, said:

"That defendant was incorporated under the general law is made apparent by the terms of its articles of which the following is a part: Art. II. The general nature of the business to be transacted shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, Iowa, including the construction, ownership and use of the depots, freight houses railway shops, repair shops, stock yards, and whatever else may be useful and convenient for the operation of railways at the terminal point of Des Moines, Iowa, as well as the transfer of cars

from the line or depot of one railway to another, or from the various manufactories, warehouses, storehouses, or elevators to each other, or to any of the railways or depots thereof now constructed or to be hereafter constructed in or around the City of Des Moines, and such corporation shall possess all the powers conferred upon corporations for pecuniary profit by Chapter 1 of title IX of the Code and the amendments thereto.' These articles were afterward amended, *but in no way was the language set out qualified in the amendment.*'"

Counsel cite this case as if it held that the attempted amendment failed because of insufficient publication. But the Court decided nothing of the kind. It decided that the Amendment which was made, one by elimination of a mere solecism, did not qualify "the general nature of the business to be transacted," so that it was, not less than it had been, "a railway corporation" with all the powers of such a corporation. So under paragraph 2 of Section 1613 of the Code there was nothing to be published. The reference to the agreement was an incongruity, an obsolete thing recognized as such by the parties and as such removed from the articles.

In Thornton vs. Baleom, 85 Ia. 198, the articles provided as to the total of indebtedness of the corporation that it "shall not at any time exceed three hundred dollars, except by a majority vote of the stockholders present at a called or annual meeting." The published notice declared simply that "the indebtedness of the company shall not exceed three hundred dollars at any one time." The Court, l. e. 201, said:

"It is claimed that this is not a true statement of the amount of the authorized indebtedness. It appears to us that it is just such a statement as the law required. It was the amount of indebtedness then authorized, and it was wholly unnecessary to publish the manner in which the limit of indebtedness might thereafter be increased or diminished."

The statutes of Iowa do not require publication of the articles in full, nor even of a summary of them, but only the seven enumerated points, or the substance of them. And so as to amendments. Everything enumerated in them and affected by the amendments was contained in the notice. There was much in the amendments which had no place in the notice. And so it was as to the reference to the 1882 agreement. It would be a veracious bull to say that as to this silence was the only statement required.

As between the stockholders, it was not necessary that any publication should be made. They had notice. They knew what had been done, for they participated in making the amendments and acted under them for years.

Heald v. Owen, 79 Iowa 95.

A DISSENTING STOCKHOLDER MUST ACT PROMPTLY.

If the complainants have any standing in this court to question the validity of the amendments of April 8, 1890, it must be in their capacity as stockholders of the defendant company. The question of the validity of a corporate action of this kind cannot be raised by one having merely contractual relations with it, but can only be raised by a stockholder or the state.

The general rule is laid down by

Cook on Corporations (6th Ed.), Vol. 2, sec. 503,
as follows:

"A stockholder may be estopped from objecting to an amendment by his express or implied acquiescence therein. Any acts indicating an acceptance by him of the amendment bind him and bar his suit. Acquiescence may sometimes grow out of his silence or delay under circumstances that called on him to dissent if he so intended. A court of equity will go far to aid a dissenting stockholder where he applies promptly and before large investments and many changes are made on the faith of the acts complained of. But laches will not be tolerated by the court, especially where important interests are involved."

In the case of

Rabe v. Dunlap, 25 Atl. (N. J.) 959, the suit was to invalidate a consolidation of two companies because beyond their corporate powers. The Court said (p. 961):

"The stockholders of a corporation have an indisputable right to have the property of the corporation applied and used exclusively for the purpose specified in its charter, and any attempt by its managers to appropriate it to any other purpose is a usurpation of power and a violation of the rights of the stockholders. * * * But stockholders, to be entitled to the summary interference of the court in cases where they seek protection against acts which are merely in excess of the power of the corporation, and are not prohibited by law, must be diligent. They must apply so recently after the doing of the act of which they complain

that the court may stop or undo the wrong to them without doing equal or greater wrong to some other person. The principle which must control the action of a court of equity in cases where the defense is laches was laid down by Lord Camden, many years ago in these words: ‘Nothing can call forth the activity of a court of equity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive, and does nothing. Laches and neglect are always dis-countenanced, and therefore, from the beginning of his jurisdiction, there was always a limitation to suits in equity.’ * * *

Or, stated with greater brevity, and in its simple essence, the rule is this: If he wants protection against the consequences of an *ultra vires* act, he must act for it with sufficient promptness to enable the court to do justice to him without doing injustice to others.”

The general rule is laid down by Circuit Court Judge Lurton, in an opinion in the Circuit Court of Appeals, Sixth Circuit, in the case of

Synnot v. Cumberland Bldg. Assn., 117 Fed. 379 (C. C. A.),

in which case it was claimed that the action complained of was invalid, so far as complainant was concerned, because complainant's proxy in voting at the stockholders' meeting exceeded his power as expressed in the proxy.

Referring to the question under consideration, Justice Lurton said (p. 385):

“We deem it unnecessary to express any opinion as to the conclusive effect upon Mrs. Synnot of the action of Hayward in participating in the

doing of business not included in the notice for the adjourned meeting, because we are of the opinion that whether her agent could waive the sufficiency of the notice of the business undertaking at that meeting or not, nothing but the most active diligence in repudiating what was there done in her name and by her apparent consent can void the consequences of her agent's action. That action was held on January 17, 1898. This bill was filed May 1, 1899. For more than a year no protest was made to the action of her agent, and, indeed, the bill filed contains no word of complaint that he had exceeded his authority or that the meeting had exceeded the notice or call made for it.

An effort has been made to excuse Mrs. Synnott for her inaction by the claim that she did not know of the action taken at the January meeting until shortly before her bill was filed. Mrs. Synnott does not testify at all. Her husband says he acted for her in looking after her stock. He states that he cannot say definitely when he got the information as to what had been done, but thinks it was several months afterward. Mr. Synnott was an old and expert building and loan man, and though he lived in another state, it is hardly credible to suppose that he long remained in ignorance of so important and public an action as that affecting this common stock.

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It will not do to say that no change occurred in the attitude of the company between that action and the filing of the bill. We may take notice that the shares in such companies are constantly changing hands, and new shares being issued at short periods, constituting new series of stock. It may well be presumed that the elimination of the special powers of this common stock by the apparent consent of the stockholders would be an important

factor in all the future issues of new stocks and sales of old. Mrs. Synnott should have actively repudiated what was apparently done for her. Until she did so every one had a right to suppose that she had agreed to permit her shares to stand upon a plane of equality with other prepaid shares of what is called installment stock and to act upon that theory."

The rule is laid down in the case of

Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co., 127 Fed. 625 (C. C. A.)

as follows (p. 629) :

“ * * * The stockholders must be charged with such knowledge as would have come to them in the exercise of due diligence and attention to their business interests, and in this case to business interests of very large magnitude.”

In the case of

Thompson v. Lambert, 44 Iowa 239,

complaint was made of the act of an agricultural association in making a donation to a railroad company. Complainants Thompson and Cressler were not present at the meeting at which the donation was authorized, but knew that such was being discussed.

With respect to the promptness with which they should have acted, the court said (p. 247) :

“Under these circumstances we are of the opinion that Thompson and Cressler had sufficient knowledge to put them on an inquiry. They knew it was proposed in some way to have the Agricultural Society aid in building the railway, and in-

quiry prosecuted with diligence and a fair degree of earnestness to obtain information, would have developed the fact as to the proposal to guarantee the notes and execute the mortgage. There is nothing tending to show there was any secrecy intended, nor was the proposition in any manner concealed. But knowing the matter was talked about and canvassed, Thompson and Cressler did nothing to prevent the consummation of the claimed illegal act, and to which they were opposed until the commencement of this action in December, 1872. They had sufficient knowledge of what was proposed to be done to warrant them in applying for an injunction as early as March, 1871, and had they done so before the loan was effected, their standing and the question for determination would have been very different.

The stockholder of a corporation who seeks to prevent the consummation of an illegal corporate act, or to avoid it, should be swift to make known his desires and assert his rights through the tribunals appointed for that purpose."

The Supreme Court of the United States in one case (*Foster v. Mansfield, etc., R. Co.*, 146 U. S. 88), has laid down the rule as follows (p. 96) :

"The bill in this case was dismissed in the court below upon the ground of laches, and also for want of equity. • • •

As the alleged fraudulent sale of this road, which constitutes the gravamen of the bill, took place August 28, 1877, and the bill was not filed until August 30, 1887, ten years thereafter, there is certainly a presumption of laches, which it is incumbent upon the plaintiff to rebut. His reply is that he did not discover the fraud until a few months before the filing of the bill. • • •

The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts. Especially is this the case where the party complaining is a resident of the neighborhood in which the fraud is alleged to have taken place, and the subject of such fraud is a railroad with whose ownership and management the public, and certainly the stockholders, may be presumed to have some familiarity."

It appears, therefore,

First. That the presumption is that all the stockholders had notice of this meeting at which the articles of incorporation were amended and had a copy of the proposed amendments.

Second. That the recitals contained in the minutes of the meeting are presumptively correct, and, therefore, that the stockholders had notice of the meeting and the proposed amendments and that they were all represented in person or by proxy.

Third. It is presumed that all stockholders consented to the enactment of the amendments and acquiesced therein.

Fourth. The filing, recording and giving notice of the amendments as provided by statute, is notice to the world of such amendments.

Fifth. That the stockholders are charged with notice of everything which they might have learned by the

exercise of reasonable diligence, and that in order to challenge the validity of these amendments it was necessary for them to act promptly, or, as the Supreme Court of Iowa put it, "*swiftly*."

For more than seventeen years the defendant company, its officers, directors and stockholders (including complainants and their predecessors) acted under these amendments and acquiesced therein and no question was ever raised about their validity until the commencement of this suit. Certainly the complainants are far from having acted "*swiftly*" as they were required to by the rules of law above set out.

COMPLAINANTS ARE NOT IN A POSITION TO COMPLAIN OF THESE AMENDMENTS, BECAUSE THEY ACQUIRED THEIR STOCK AND WHATEVER INTEREST THEY HAVE IN THE TERMINAL COMPANY, SUBSEQUENT TO THE ENACTMENT OF THE SAME AND AFTER THE SAME WERE FILED, RECORDED AND PUBLISHED, AS REQUIRED BY STATUTE.

So far as the Wabash is concerned, the interest which it now claims to have in the property in controversy belonged originally either to the Des Moines & St. Louis Railroad Company or to the Wabash, St. Louis & Pacific Railway Company, and for the purposes of this proposition it doesn't matter which.

On the 25th day of April, 1888, the Wabash, St. Louis & Pacific Railway Company transferred to James F. Joy, Ossian D. Ashley, Edgar T. Welles and Thomas H. Hubbard, known as the Purchasing Committee, all its property (ex. 45, vol. II, p. 536). After describing the specific property, this deed by its terms (p. 540) in-

cludes "also all the property, rights, interests and choses in action acquired by said Wabash Railroad Company after June 1st, 1880, whether hereinbefore described or not." This would be sufficient to transfer to the Purchasing Committee whatever rights the Wabash, St. Louis & Pacific Railway Company had in the property in controversy.

As we have heretofore shown, the Des Moines & St. Louis Railroad Company authorized the issuance of its share of the stock to the Purchasing Committee and all the parties recognized the title of the Purchasing Committee to the stock.

On June 1, 1899, about nine years after the amendments to the articles of incorporation, the Des Moines & St. Louis Railroad Company transferred to the complainant, The Wabash Company, all the property of the first named company (ex. 44, vol. II, p. 533), and included in the deed is the following:

"does grant, bargain, sell, assign and set over unto the Wabash Railroad Company, its successors and assigns forever, all of its said line of railroad and right of way as the same now is, or may be hereafter constructed, or acquired in said State of Iowa, commencing at a point in or near the City of Des Moines, where said road connects with the tracks of the Des Moines Union Railway Company, and extending from thence * * * to the town or city of Albia in Monroe County, * * * and all its rights, privileges and franchises and all other things, real and personal, now owned, or used, or that may be hereafter owned or used by the party of the first part in connection with the line of railroad above described and herein and hereby granted, and especially including all the rights and leaseshold and other interests of the first party under a contract dated May 10th, 1889, between the

Des Moines Union Railway Company of the first part and the Des Moines and St. Louis Railroad Company, the Des Moines and Northwestern Railway Company, and the St. Louis, Des Moines and Northern Railway Company, of the second part."

Whatever interest in the property in controversy was acquired by the complainant, The Wabash Company, from the Des Moines & St. Louis Railroad Company was acquired by virtue of this deed. On August 18, 1898, the Purchasing Committee transferred to The Wabash Company, all the property acquired and then owned by the Purchasing Committee. Whatever interest the complainant, The Wabash Company, acquired from the Purchasing Committee in the property in controversy was acquired by virtue of this deed and by the transfer of the stock of the terminal company to the Continental Trust Company on March 23, 1899, which latter company held the same as security for the indebtedness of the Wabash Company.

On the 1st day of May, 1899, Chicago, Milwaukee & St. Paul Railway Company acquired from the Des Moines, Northern & Western Railroad Company (ex. 74, vol. II, p. 673), its interest in the property in controversy, which is described (p. 675) "*and also a one-fourth interest in the capital stock of the Des Moines Union Railway Company.*"

It appears, therefore, that for a period of about nine years complainants' predecessors acted under the articles of incorporation of the terminal company, as amended on April 8, 1890, and that complainants for another period of eight years after acquiring their interest in the stock, themselves acted under said articles before they brought this suit.

The ninety-fourth equity rule provides as follows:

“Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.”

This rule is carried forward in substantially the same language as equity rule number twenty-seven, taking effect February 1, 1913.

This proceeding, so far as it relates to the validity of the amendments to the articles of incorporation of April 8, 1890, is a proceeding by the stockholders of the terminal company founded on alleged rights which may properly be asserted by the corporation, that is, the stockholders in the terminal company having the power to amend the articles of incorporation, have the power to repeal such amendments or to declare them invalid and of no effect, if such is true. The proper forum to which the complainants should make their first appeal is the annual meeting of the stockholders. This has never been done, although seventeen such annual meetings were held subsequent to the adoption of the amendments and before the commencement of this suit. During all these years the subject of the validity of

these amendments never seems to have been mentioned by any one to any one, or to have been thought of by any one until the value of this property became so great as to excite the cupidity of complainants.

The purpose of the enactment of the rule was twofold: *first*, to prevent collusive suits being brought in the United States courts, and, *second*, to establish the equitable rule of law that one who has bought into a corporation may not complain of the acts of the corporation prior thereto, because he bought with actual or constructive knowledge of the situation, and because any other rule might permit a holder of stock to challenge the act of the corporation even though his stock had been voted in favor of such act.

The second reason for the rule above indicated applies with twofold force when we come to consider the validity of the amendments to the articles of incorporation enacted prior to the acquisition of the stock by complainants. In the first place, the amendments having been executed, acknowledged, recorded, and notice having been given as provided by law, subsequent stockholders have constructive notice of the amendments; and in the second place, complainants do not claim to have been deceived with respect to these amendments or to have been ignorant of them. Under these circumstances, it seems to us that with respect to this particular issue complainants come squarely within the terms of equity rule XCIV, for both of the reasons suggested, and for this reason if for no other they are not entitled to relief with respect to these amendments.

III.

THE COMPLAINANTS ARE ESTOPPED FROM ASSERTING THAT THE OWNERSHIP OF THE TERMINAL PROPERTY IS NOT VESTED ABSOLUTELY IN THE DES MOINES UNION RAILWAY COMPANY, AND FROM CLAIMING THAT THE STOCK OF THE COMPANY HELD BY THE DEFENDANT, F. M. HUBBELL & SON, DOES NOT REPRESENT A VALUABLE INTEREST THEREIN.

As we have heretofore indicated, the real purpose of this suit is to secure a decree which will make the capital stock held by the defendant, F. M. Hubbell & Son, of no value. If the complainants owned all the stock in the defendant company, then the question of whether it had a perfect title to the terminal property would be of no importance, because in either event the complainants would own the beneficial interest. Therefore, they seek a decree which will give them a direct interest in the property and which would destroy the value of the stock.

The doctrine of equitable estoppel is well settled in the courts of the United States and in the State of Iowa, as well as in other courts of last resort. In order to meet the rule, the following facts must appear:

1. Representations, either active or passive, on the part of the persons against whom the rule is sought to be enforced.
2. A reliance upon such representations by the person or persons in whose favor the doctrine is invoked.

3. Acts of such persons resulting in changing their position.

In the

Encyclopedia of the U. S. Supreme Court Rep.,
Vol. 5, p. 939,

the editor of that work refers to the principle as follows:

“The principle of estoppel *in pais* or by the act of the party is an important one in the administration of the law. It is founded in reason and justice and in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is available only for protection, and cannot be used as a weapon of assault. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, save them from defeat or secure those ends. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked.”

In the case of

Morgan v. Railway Co., 96 U. S. 716,

the court lays down the rule as follows (p. 720):

“The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else could save

them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights, when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. *The Bank of the United States vs. Lee*, 13 Pet. 107.

He is not permitted to deny a state of things which by his culpable silence or misrepresentations he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. *Merchants' Bank vs. State Bank*, 10 Wall. 604."

In the case of

Kirk v. Hamilton, 102 U. S. 68,

the court says (p. 75) :

"In the view we take of the case, it is unnecessary to pass upon these several objections. If it be assumed that the record of the suit of *Moore & Co. vs. Kirk, etc.*, was, of itself, insufficient in law to divest Kirk of title to the premises in dispute, or to invest Hamilton with title, the question still remains, whether the facts disclosed by the first bill of exceptions do not constitute a defense to the present action.

After the confirmation of the sale of April 19, 1864, before any deed had been made, and while the cause was upon reference for a statement, as well of the trustee's account as for distribution of the fund realized by the sales, Kirk it seems, appeared before the auditor, by an attorney, and made objection to the allowance of the simple-contract debts which had been proven against him in his absence. So far as the record discloses, no other objection to the proceedings was interposed.

by him. Undoubtedly, he then knew, he must be conclusively presumed to have known, after he appeared before the auditor, all that had taken place in that suit during his absence from the District, including the sale of the premises in dispute, which took place only a few months prior to his appearance before the auditor. If that sale was a nullity, the court, upon application by Kirk, after his appearance before the auditor, could have disregarded all that had been done subsequently to the first sale, discharged Hamilton's bond, returned the money he had paid, and, in addition, placed Kirk in the actual possession of the property. No such application was made. No such claim was asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in what had been done in his absence. In 1868, three years after his return to the city, and two years after Hamilton had secured a deed in pursuance of his purchase he became aware that Hamilton was in actual possession of the premises, claiming and improving them as his property. He personally knew of Hamilton's expenditures of money in their improvement, and remained silent as to any claim of his own. Indeed, his assertion while the improvements were being made, of claim to only three feet of ground next to the adjoining lot upon which he resided, was in effect, a disclaimer that he had, or would assert, a claim to the remainder of the lots 7 and 9 which Hamilton had purchased at the sale in April, 1864, and his subsequent declaration that he was in error in claiming even that three feet of ground, only added force to his former disclaimer of title in the premises. Hamilton was in possession under an apparent title acquired, as we must assume from the record, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction.

The only serious question upon this branch of the case is whether, consistently with the authorities, the defense is available to Hamilton in this action of ejectment to recover the possession of the property. We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral declarations. ‘What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asservation,’ became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in *Wendell vs. Van Ransselaer*, 1 Johns (N. Y.) Ch. 344: ‘There is no principle better established, in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffiers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.’ p. 354.”

In

Linton v. Nat. Life Ins. Co., 104 Fed. 584,

Judge Sanborn states the rule as follows (p. 589):

“ * * * One who by his acts or representations or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusiveley estopped from interposing such denial.”

In the case of

Given v. Times Printing Co., 114 Fed. 92,

the same authority states the rule as follows (p. 95) :

"No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself or more salutary in its effects, than that one who, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong at the expense of the innocent purchaser or contractor who believed him. It is salutary because it represses falsehood and fraud. It rests on the solid foundation of our common sense of justice, which revolts at the idea of rewarding the intentional or culpably negligent deceiver at the expense of the innocent purchaser who believed him."

In this latter case this rule was applied to a sole stockholder in a corporation who had sold his stock without disclosing the fact of the existence of an indebtedness of the corporation to him.

The rule in Iowa is laid down as follows:

"Where a party by his conduct induces another to act to his own disadvantage he will not afterwards be permitted to change his position."

Wright v. Leith, 146 Iowa 290.

Seberg v. Bank, 141 Iowa 99.

Anderson v. Buchanan, 139 Iowa 676.

It will be remembered that in February, 1890, the defendant, F. M. Hubbell, and G. M. Dodge each purchased of the Purchasing Committee one-eighth (or 500 shares) of the capital stock of the defendant company, for which they paid a valuable consideration, which consideration was finally received by The Wabash Company; that in June of the same year, the defendant, F. M. Hubbell, purchased an additional 500 shares from the Purchasing Committee; that this stock became the property of the Des Moines, Northern & Western Railway Company, and that in 1892 the defendant, F. M. Hubbell & Son, acquired from the Des Moines, Northern & Western Railway Company 2,500 shares of the stock of the defendant company, which ever since said date has stood upon the books of said company as owned by F. M. Hubbell & Son; that during all the years since 1890, up to the commencement of this suit, the defendant, F. C. Hubbell, devoted substantially all his time to the growth, management and development of the terminal property, and the defendant, F. M. Hubbell, a large share of his time to such purpose, without any compensation whatever, except as might accrue to them by reason of the increase in the value of the property and the resulting increase in the value of their stock.

Upon this branch of the case, what we have for consideration is, what acts were done or representations made, either active or passive, by complainants and their predecessors, leading the defendants to believe, and authorizing them to believe that the defendant company had a good title to the property in controversy, and therefore that their stock represented a beneficial interest therein and induced them to part with

their money and devote years to the development of the terminal property.

As we have already said, the contract of January 2, 1882, did not contemplate the organization of a terminal railway, but rather a terminal property which might be used jointly by the parties to that contract and such others as might thereafter join. What is there in the record to show a change in this plan and upon which defendants had a right to rely?

The articles of incorporation of the defendant company adopted in 1884 were, as we have already shown, adopted at the instance of, and specifically ratified by the three railroad companies parties to the contract of January 8, 1882.

After setting out this contract as a part of the preamble, those articles provide (vol. II, p. 419):

"Whereas, it was provided in the contract aforesaid that a Depot Company might be organized to take permanent charge of the property, and it was the *understanding of the parties* that such Company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto."

Were the defendants required to understand from this that the beneficial interest in this property was still to remain in the three railroads parties to the contract of 1882, and that the terminal company was to only acquire a naked legal title to the property, or were they justified in believing that this evidenced a change in the plan? Note that this recital states the fact that the contract provides "*that a Depot Company might be organized to take permanent charge of the property,*" but that it was the "*understanding*" (not the contract

of the parties), that such company might "acquire," etc. This latter was something outside of the contract and an understanding which the parties were proceeding to carry out.

Likewise the next recital:

"Now, Therefore, for the purposes aforesaid, as well as for those hereinafter expressed, the undersigned hereby associate themselves in a body corporate, and adopt the following:"

Were they required by this to understand that this corporation was being born simply for the purpose of carrying out literally the contract of 1882, or were they justified in believing that there were some other purposes, to-wit, "those hereinafter expressed"?

Note the provisions of article 2, which provide that the general nature of the business to be transacted shall be the "*construction, ownership and operation of a railway, in, around and about the City of Des Moines, Iowa,*" including the ownership of depots, freight houses, etc., and the business of transferring cars, none of which was contemplated by the contract of January 2, 1882. By these articles the terminal company assumed the powers and incurred the obligations of a common carrier—something which was not contemplated by that contract. Were not the defendants authorized from this to believe that a change was contemplated in the terminal plans, as indicated by that contract?

Again, examine article 3 of the original articles of incorporation (vol. II, p. 420), which fixes the capital stock at \$1,000,000.00 and authorizes its issuance and authorizes the board

"to receive in payment therefor the *property* and *franchise* in the City of Des Moines, now held by the Des Moines & St. Louis Railroad Company, the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company, Jas. F. How, Trustee, Jas. F. How and Grenville M. Dodge."

Now the contract of January 2, 1882, did not contemplate that the terminal property should be acquired by an independent corporation, or that the franchise incident to the terminal property should be acquired by a terminal corporation, but this article indicates that at this time it was contemplated that both the terminal properties and the franchises incident thereto should be acquired by the defendant company in consideration of the issuance of its capital stock. Ought the defendants to have understood from this that no change had been made in the plan as evidenced by the contract of January 2, 1882?

These were acts of the three railroads parties to the contract of January 2, 1882, and complainants' predecessors, which were specifically authorized and afterward specifically ratified by action of their boards of directors. By the adoption of these articles there was created a corporation for pecuniary profit under the laws of the state of Iowa, for the specific purpose of acquiring the terminal property and the "*franchises*" connected therewith.

A mere depot company organized in strict accord with the 1882 contract or in strict accord with the statutes of Iowa, Section 2099, Code of 1897, authorizing the formation of depot companies is something very different from the terminal company which the parties did in fact create by their articles of incorporation.

The Company in fact formed was organized under the general incorporation laws of the State and was vested with all the powers of a railroad company and this none the less so, that its lines were all within the limits of the City of Des Moines, and that it possessed among its powers, the distinctive powers of a depot company.

A depot company under the laws of Iowa is restricted as to the manner and extent of acquiring property and also as to the functions it may perform. In the case of Morgan against this very company, 113 Iowa 561, the crucial question was as to the character of it, whether a mere depot company or a railway company. Of a depot company, the Court said:

"It is not intended that it shall operate locomotives or cars. Its purpose is to construct buildings and tracks for use by railway companies."

As to railway companies the Court said:

"There is no reason for assuming that a railway company could not also, irrespective of this act (Depot Act) construct a union depot, or that in so doing it would lose any of the powers it possessed under the general incorporation Act."

It was contended that because this railway was confined within the city limits and its business was principally a terminal business, it was therefore not a railway, but a depot company. As to this the Court said:

"We hardly think it is meant that a railway's rights are to be measured by its length. Nor do we believe that length of line alone fixes the character of such a corporation. This (the Des Moines Union) is solely a commercial railway, and as such it is invested with the rights given by statute alike to all incorporations of that character. The num-

ber of tracks which they may lay is not limited by statute, and it would seem contrary to public policy that such limitation should be made. They are and should be allowed to provide facilities for doing the business required by public demand."

What were the defendants authorized to believe and understand from the resolutions passed by the three railroad companies parties to the contract of January 2, 1882, on the 1st day of January, 1885? The resolutions were exactly alike and we need consider only one set of them.

One of the resolutions passed by the stockholders of the St. Louis, Des Moines & Northern Railway Company at this time was as follows (vol. II, p. 423):

"Whereas, on the 10th day of December, A. D. 1884, a corporation under the name and style of the Des Moines Union Railway Company was organized as contemplated, and provided in the aforesaid contract to *acquire, hold, use and enjoy the real estate property, rights and franchises in the City of Des Moines, east of Farnham Street in said City of the aforesaid railway companies and signatories of said contract acquired or held thereunder and to carry out the purposes of the said contract of January 2nd, 1882.*"

What did the defendants have a right to believe from this action? The right to use the terminal property for the purpose of carrying on a terminal business was a *franchise* which was possessed by the three railway companies in the City of Des Moines by reason of their having devoted the terminal property to terminal purposes; and it was this franchise, as well as the property itself, which the complainants' predecessors say in

this resoluton it was contemplated should be acquired by the terminal company.

The resolution then, after having specifically ratified the articles of incorporation of the terminal company, proceeds as follows:

“Resolved: That the proper officers of this Company be authorized upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company to which it may be entitled, under said contract to convey, assign and transfer to said Company all its right, title and interest of whatever name and character, in and to the real estate, franchises, choses in action and rights in possession or contingent to all the property in the City of Des Moines east of Farnham Street in said City, now held, enjoyed or claimed by either or all of the signatories of said contract of January 2, 1882, or any agent or trustee thereof purchased, acquired or held in pursuance of said contract.”

Let us inquire what possible interest complainants' predecessor, the St. Louis, Des Moines & Northern Railway Company, could have possessed in the terminal property which was not authorized by this resolution to be transferred to the defendant company. This resolution covered all the property held by any of the signatories to the contract of January 2, 1882, and authorized the transfer of all the “*right, title and interest of whatever name and character*” the St. Louis, Des Moines & Northern Railway Company had in said property or franchises.

As we have said, identical resolutions were passed by the two other railroads parties to the contract.

Again, note the resolutions which were passed by the defendant company on the same day (vol. II, p. 432-5), a part of which is as follows:

“That the President, Vice President, Secretary and Treasurer of this Company be, and they are hereby, appointed a Committee to confer with the several parties to said contract and agree with them severally upon the *terms and price at which they will respectively assign, transfer and convey said railroad property and franchises to this Company*, and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this Company with the *title, control and management* of said properties provided for in said contract of January 2nd, 1882.”

Were the defendants authorized to believe that it was the understanding of the defendant company that it was to get transfers which would “*fully invest*” the defendant company with the “*title*” to the terminal property, or should they have understood that this language contemplated that the three railroads parties to the contract of January 2, 1882, would still continue to be the beneficial owners of the property?

These resolutions were known to Mr. Hubbell, because he was a director in, and secretary of each of these companies, and they stood unrepealed on the record and were acted upon by the execution of the deeds of 1888.

Again, take the resolutions of November, 1887, by which the trustees, How and Dodge, were authorized to transfer the legal title to the defendant company upon payment of the purchase price therefor. These resolutions were passed and notice thereof was given to the defendant company, whereupon that company, acting

through its board of directors, after reciting the giving of said notice, resolved as follows (vol. IV, p. 1300) :

“Therefore, It Is Resolved, That on receipt from the Des Moines & Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company and the Des Moines & St. Louis Railway Company and from James F. How, Trustee, and G. M. Dodge, of deeds to this Company of the property standing in their name in the City of Des Moines, that the officers of this Company be authorized to issue to said James F. How and G. M. Dodge, respectively, an agreement to deliver to them, as soon as prepared, bonds for the amount of money with interest and taxes added, which will be shown by them, at that time, to have been expended by or through them for or on the property referred to.”

By this resolution and an additional resolution passed at the same time, which we have not taken the space to quote, the defendant company accepted the proposition made to it by the three railroad companies and agreed, in consideration of a transfer of the property, to pay therefor the full amount which the three railroad companies, or others in interest, had invested in the terminal property, together with interest and taxes, and in addition thereto issue to them defendant’s capital stock. There was in this resolution no reservation to the three railroad companies of any interest in the terminal property.

So we see that not only was a corporation organized for the specific purpose of acquiring the title to this property and the franchises incident thereto, but that a transfer of such property and the franchises incident thereto was properly authorized by all of the cor-

porations interested therein, and this without any reservations of any kind. Let us now see what was actually done to carry out these resolutions.

Deeds were duly executed and delivered to the defendant company by How and Dodge. Of course, How and Dodge being merely trustees, could not on their own motion have transferred to the defendant company a good title, but their deeds taken in connection with these resolutions and the actual payment of the purchase price, would and did of themselves transfer a perfect title. However, we are not required to rely upon these deeds. Fortunately, both the Des Moines & St. Louis Railroad Company and the St. Louis, Des Moines & Northern Railway Company executed deeds to this property, the former covering all the property, and the latter a portion thereof.

The deed of the Des Moines & St. Louis Railroad Company, after describing the particular property which stood in its name, continued as follows (vol. II, p. 458) :

“And all of the real estate within the City of Des Moines, Iowa, which is the property of the grantor.”

Now what was the purpose of putting in the deed this clause, and to what property did it refer? The deed had already contained a description of the specific property which stood on the record in the name of the Des Moines & St. Louis Railroad Company, and therefore this clause must have referred to some other property. Under the contract of January 2, 1882, the Des Moines & St. Louis Railroad Company was the beneficial owner of one-half of all the terminal property, no matter in whose name it stood, and it was the

only party who could authorize or transfer such beneficial interest. Therefore, this clause in the deed must have reference to that portion of the terminal property in which the Des Moines & St. Louis Railroad Company owned a beneficial interest of one-half which did not stand in its name, and this thought is emphasized by the following language of the deed (p. 458):

“together with all real estate which may hereafter be acquired by this grantor either by condemnation proceedings or otherwise. Also all its embankments, bridges, turnouts, side-tracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turn-tables and all its railroad property acquired and to be acquired, and everything appurtenant to said railroad, and all franchise and rights it may have acquired by grant, donation, purchase or otherwise, and particularly all rights, franchises and privileges granted by the City of Des Moines, Iowa, under an ordinance ‘granting the right of way to the Des Moines and St. Louis Railroad Company and its assigns, over, across, along and upon certain streets and alleys in the City of Des Moines, Iowa, and the right to bridge the Des Moines River on the south alley in said City between Court Avenue and Vine Street.’ ”

Upon this terminal property had been constructed embankments, bridges, turnouts, sidetracks, buildings and other structures, and of one-half of this the Des Moines & St. Louis Railroad Company was the beneficial owner under the contract of January 2, 1882, and this deed was for the purpose of transferring to the defendant company this beneficial ownership.

The deed then continues (p. 458) :

‘And the said Des Moines and St. Louis Railroad Company hereby covenants, *to warrant and defend* the said premises against all the *lawful claims of all persons whomsoever, claiming by, through or under it.*’”

When the defendants examined this deed and noted that it not only described the property which stood in the name of the Des Moines & St. Louis Railroad Company, but also included all the property of every kind and character owned by that company in the City of Des Moines, or in which it had any interest, and that it warranted the title to said property against all persons claiming by, through or under it, what reason did they have to believe that there was reserved to that company any possible interest in this property?

The deed of the St. Louis, Des Moines & Northern Railway Company (ex. 21, vol. II, p. 455) is no less significant. After describing the specific property which stood in its name, this deed continues:

“ * * * Together with all and singular the tenements, hereditaments and appurtenances thereto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To Have and to Hold all and singular the above mentioned and described premises together with the appurtenances, unto the said parties of the second part and assigns forever.”

Upon reading this deed, ought the defendants to have believed that by the terms thereof the St. Louis, Des Moines & Northern Railway Company retained any interest of any kind in this property? If this language does not convey all and every possible interest which that company had in the real estate described, what language could be conceived which would effect that purpose?

The next act of the parties was the making of the contract of May 10, 1889, the parties to which were the defendant company on the one hand, and the Des Moines & St. Louis Railroad Company, the St. Louis, Des Moines & Northern Railway Company and the Des Moines & Northwestern Railway Company (successor to the Des Moines Northwestern Railway Company) on the other (vol. II, p. 479).

This contract, in so far as it relates to the title and ownership of the property, is as follows:

“Whereas, the said party of the first part (the Des Moines Union Railway Company) is the owner of valuable terminal facilities in the City of Des Moines, Iowa, as hereinafter described; and

Whereas, the respective parties of the second part have railroads in the State of Iowa which terminate at, or run into and through said City of Des Moines, and in order to prevent unnecessary expense, inconvenience and loss attending the accumulation of a number of stations, and in order to facilitate the public convenience and safety, it has become important that said second parties should have the use of the terminal facilities of said first party; and

Whereas, said party of the first part has become incorporated and organized under the laws of the State of Iowa *for the purpose of owning and op-*

erating a line of railway in the said City of Des Moines, Iowa, extending from the eastern boundary line of said city to Farnham Street, in the western part thereof; and

Whereas, said party of the first part, in pursuance of said charter has *acquired* and now *owns* a railway in said city, as above set forth, and has already acquired or constructed a large number of valuable main and side tracks, depots, depot grounds, lands, yards, shops, round houses, freight houses and other terminal facilities, and intends to acquire and construct more; and

Whereas, said second parties are each desirous of having the right to use said terminals in connections with their respective railroads; and

Whereas, for the protection of the parties here-to and their assigns, it is important that the rights, duties and liabilities of each in regard to the whole subject-matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance and repairs, shall be stated and defined.

Now, therefore, in consideration of the premises, it is mutually agreed by and between said party of the first part and each of the several parties of the second part (each of said second parties contracting for itself), as follows:

Section One. The party of the first part agrees to proceed with reasonable dispatch, and whenever its board of directors shall deem it expedient, to erect and furnish for the use of the parties of the second part, in said City of Des Moines, a union passenger depot, and such additional switches, sidings, freight depots, round houses, shops, water tanks, and yard appurtenances, as the board of directors of said first party may consider reasonable, and for those purposes said first party shall acquire by lease, purchase or otherwise such additional real estate as may be necessary.

Section Two. The amount of such additional grounds and the form, character and cost of said union depot and other structures and appurtenances to be erected and furnished by said party of the first part, as well as the management, operation, improvement and repairs thereof, shall in all matters not otherwise specifically provided for herein, be determined by the board of directors of said first party."

Here is the language of the parties themselves (the predecessors of complainants) put in writing a little more than a year after the transfer of the property to the defendant, by their own counsel.

Now, if the second parties to this contract (complainants' predecessors) were the beneficial owners of this property, why did they state in this contract that the Des Moines Union Railway Company was the owner of it, and why, if they were the beneficial owners of this property or entitled to use the same for railway purposes in perpetuity, were they contracting with the Des Moines Union Railway Company for such use or anything more than the mode of operating the property? And why, if the defendant company was organized merely for the purpose of holding the naked legal title to this property, do they recite the fact that it was organized for the purpose of owning and operating a line of railway in the City of Des Moines? And why do they state that in pursuance of its charter it has already acquired and owns a railway and intends to acquire and construct more? And why do they recite the fact that the parties of the second part (complainants' predecessors) are desirous of having the right to use said terminals in connection with their respective railroads, if they already had that right? And why, if the

Des Moines Union Railway Company was a mere agency for these three railroad companies, do they provide that the question of the extent of property to be acquired and constructed shall be vested in the board of directors of the Des Moines Union Railway Company?

If the court has any lingering doubt in its mind on the subject under consideration, examine now the proceedings of April 8, 1890, by which the articles of incorporation of the defendant company were amended, and the proceedings leading up thereto.

Upon a little reflection, the causes leading up to this action, and the purposes thereof, become perfectly apparent. The items to which we have called the court's attention demonstrate an intention on the part of all parties to give to the defendant company a perfect title to the property in controversy, notwithstanding the fact that as originally contemplated by the contract of January 2, 1882, the beneficial ownership of the property was to be in the three railroad companies parties thereto. An ambiguity had crept into the record by reason of the fact that the contract of January 2, 1882, had been included in the articles of incorporation as a preliminary recital thereto. We are not here going to set out the proceedings of April 8, 1890, as they have heretofore been quite extensively referred to in two different places in our brief. They concededly show an intention to forever put at rest any question about the title to the terminal property. The persons who took part in the meeting were the persons who knew what had been intended, because they had been the actors from the beginning. Complainants and their predecessors conducted the affairs of the defendant corporation under these amended articles of incorpo-

ation for more than seventeen years prior to the commencement of this suit. Read them and then answer the question of whether or not the defendants were authorized to believe that the defendant had a good title to the property in controversy, and that the capital stock of the defendant company represented a beneficial interest therein.

Let us now turn to the sale and transfer of the stock in the defendant company. The first transaction to which we will call attention is the contracts by which Polk & Hubbell acquired for the Des Moines & Northwestern Railway Company the line of road extending from Des Moines to Fonda and formerly owned by the Des Moines Northwestern Railway Company, and a one-fourth of the capital stock of the terminal company.

It will be remembered that by the terms of the contract of October 9, 1886 (ex. 263, vol. IV, p. 1573), Polk & Hubbell agreed to purchase of the Purchasing Committee the line of railway formerly owned by the Des Moines Northwestern Railway Company, and a one-fourth interest in the terminal property. By a supplemental agreement made the 10th day of September, 1887 (ex. 265, vol. IV, p. 1575), it was agreed in part as follows (p. 1576):

"Simultaneously with the conveyance above mentioned of one-fourth interest in the terminal property at Des Moines, the same shall be mortgaged back to the Purchasing Committee for the further security of the said \$145,000. In case, however, the terminal property at Des Moines shall be merged in a terminal company either before or after the transfer of one-fourth interest as above, the bonds and stock received from the Terminal Company in exchange for said one-fourth

interest shall be transferred in lieu of the property of Messrs. Polk & Hubbell, or their assignees, or transferred by them to the Committee, to be held by the Committee as a further security for the payment of the \$450,000 above mentioned."

Now, by the terms of this contract the Purchasing Committee agreed to transfer to Polk & Hubbell a one-fourth interest in the terminal property, without any reservation whatever, on "*in lieu thereof,*" the stock and bonds received from the terminal company in exchange for said one-fourth interest. It is apparent that one-fourth of the stock and bonds couldn't be equivalent to one-fourth of the property unless the corporation issuing the stock and bonds had a perfect title to the property.

It will be remembered that in February, 1890, Mr. Hubbell and General Dodge each purchased of the Purchasing Committee certain bonds of the Des Moines Union Company and one-eighth of its capital stock, and this purchase was formally ratified at a meeting of the directors of the Des Moines & St. Louis Railroad Company held April 8, 1890, at which were present James P. How, C. M. Hays, F. M. Hubbell, A. B. Cummins, H. S. Priest and George C. Grover, all of whom, except Mr. Hubbell, were officers or attorneys for the complainant, The Wabash Company. We have already shown that the purchase price for this stock was paid to the Purchasing Committee and by them paid to the complainant, The Wabash Company, and that the latter still retains this purchase price. We have also shown that the contract covering this purchase was prepared or revised by Colonel Blodgett. Now what were the members of the Purchasing Committee and

Colonel Blodgett, Mr. Hays, Mr. How, and the attorneys of The Wabash Railroad Company trying to do when they sold this stock to Hubbell and Dodge? There is no room for question here. On the one side they were selling, and on the other were buying, what on both sides was believed to be of substantial value.

In this connection, it is important to note that the action of the Purchasing Committee was specifically ratified by the board of directors of the complainant, The Wabash Company, after the same had been reported to it by the Purchasing Committee and investigated by E. B. Pryor, then assistant auditor of the railroad company. Commencing on page 1540 of volume IV will be found a report made by the Purchasing Committee to the board of directors of the Wabash Company on August 16, 1898, in which it makes an accounting to the railroad company of all its doings. The Purchasing Committee reports the sale of the stock and bonds of the Des Moines Union Railway Company and accounts for the proceeds thereof (see top of p. 1543), and again reports the amount received as interest on bonds and stock of the Des Moines Union Railway Company (see p. 1544, near bottom of page). Upon presentation of this report to The Wabash Company, Mr. E. B. Pryor, assistant auditor, makes an affidavit that he has examined in detail the books and accounts of the Purchasing Committee, as well as the attached report, and he believes the same to be correct (near bottom of p. 1551).

Passing upon this report, the board of directors of The Wabash Company state in part as follows (p. 1552):

'Whereas, Said report, and the form of said conveyance and assignment are satisfactory to the Board of Directors; Now, Therefore, Be It

Resolved, That said final report and statement of the accounts and doings of said Committee under said agreements, be, and the same hereby are approved."

How can The Wabash Railroad Company, which received and retains this money, now claim that the stock didn't represent anything of value?

The same remarks apply to the subsequent transaction of June, 1890, by which Mr. Hubbel purchased of the Purchasing Committee an additional 500 shares of stock in the defendant company, as to the details of which we do not here need to go.

It will be remembered that all the stock acquired by Mr. Hubbell and General Dodge from the Purchasing Committee afterward became the property of the Des Moines, Northern & Western Railroad Company, and that about October, 1893, F. M. Hubbell purchased of this Company 2,500 shares of this stock, which was immediately transferred to F. M. Hubbell & Son on the books of the defendant company and has ever since so remained. F. M. Hubbell & Son paid a valuable consideration for this 2,500 shares of stock and paid it to the predecessor of the Chicago, Milwaukee & St. Paul Railway Company, and that Company acquired its first interest in its predecessor with full knowledge that these 2,500 shares of stock had been transferred to F. M. Hubbell & Son, and that the only interest which its predecessor had in the terminal property or the terminal company was the interest represented by the 1,000 shares of stock which its predecessor then had and which is now owned by the complainant, the Mil-

waukee Company. Subsequently the Milwaukee Company acquired the property of its predecessor by purchase, and never suspected that it thereby acquired any interest in the terminal property except that represented by this 1,000 shares of stock.

Among the things upon which the Hubbells were justified in relying, as indicating that the complainants and their predecessors claimed only a stock interest in the property, is the fact that from the very beginning (May 1, 1888), the affairs of the defendant company were managed by its own stockholders, its board of directors and its officers. It acquired additional real estate, it constructed depots, buildings, tracks and other terminal facilities, made contracts with the complainants, their predecessors and other parties and performed all its obligations to the public as a common carrier.

In every way, for a period of nearly twenty years prior to the bringing of this suit, the defendant treated this property as its own, and all this with the knowledge of the complainants and their predecessors, because at every annual stockholders' meeting the complainants or their predecessors were present, as shown by the record, and at each of these meetings there was read for the information of the stockholders the minutes of all the meetings of the directors and the executive committee since the last preceding annual stockholders' meeting, and the action of such directors and executive committee was formally approved.

Not only this, but the record shows that from the time F. M. Hubbell & Son acquired this stock in 1893, it was voted by them at each stockholders' meeting for the purpose of managing the affairs of the defendant company, and no question was ever raised with respect

to their right so to do. In other words, the defendants, with the knowledge and acquiescence of complainants and their predecessors, treated this stock as though it represented a valuable interest in this property, and because thereof they gave their time for the best part of their lives to the development and improvement of this property without any compensation whatever except that which will accrue to them by reason of the increase in the value thereof. Not only this, but the question of the ownership of this stock by F. M. Hubbell & Son was specifically brought to the attention of the complainants and their predecessors.

It will be remembered that the twenty-sixth section of the contract of May 10, 1889 (vol. II, p. 486), which was executed before any certificates of stock were issued, provided that the stock of the defendant company should be issued one-half to the Des Moines & St. Louis Company, and one-fourth each to the Des Moines & Northwestern Company and the St. Louis, Des Moines & Northern Company.

Subsequent to the date the defendant, F. M. Hubbell & Son, acquired the 2,500 shares of stock in the defendant company and the same were transferred upon the books of the defendant company to F. M. Hubbell & Son, negotiations were had for the renewal or extension of the operating contract of May 10, 1889.

Several drafts of such a contract were prepared and considered by the defendant and by the complainant, The Wabash Company.

These proposed agreements appear in volume IV as defendants' exhibits 382 (p. 1694), 383 (p. 1703), 384 (p. 1712) and 385 (p. 1713). In each one of these drafts appears the following as a part of the last section (pp. 1702, 1711, 1722 and 1733) :

"It is further understood and agreed that this contract is entered into in lieu of and as a substitute for a certain agreement entered into on the 10th day of May, 1889, between the Des Moines Union Railway Company, the Des Moines & St. Louis Railroad Company, the Des Moines & Northwestern, and the St. Louis, Des, Moines & Northern Railway Company, * * * and that the capital stock of the said Des Moines Union Railway Company therein mentioned is now rightfully held as follows, to-wit:

The Purchasing Committee of the Wabash, St. Louis & Pacific Rail- way Company	500 Shares
The Des Moines, Northern & West- ern Railroad Company	1,000 Shares
F. M. Hubbell & Son	2,500 Shares

Of the above shares belonging to said Purchasing Committee, two shares stand upon the books of the Company as follows: Joseph Ramsey, Jr., One Share, and H. L. Magee, One Share.

Of the shares belonging to the Des Moines, Northern & Western Railroad Company two shares stand upon the books of the Company as follows: A. B. Cummins One Share, F. M. Hubbell One Share.

Of the shares belonging to the said F. M. Hubbell & Son five shares stand upon the books of the Company as follows:

F. M. Hubbell, One Share.
F. C. Hubbell, One Share.
H. D. Thompson, One Share.
A. N. Denman, One Share.
C. Huttenlocher, One Share."

These proposed contracts were discussed and criticized by the officers and attorneys of the complainant,

the Wabash Company, and the defendant, the Des Moines Union Company, and various changes were from time to time proposed, but at no time was any question raised about the correctness of this portion of the proposed contracts reciting the ownership of the capital stock.

The making of this new contract took the shape of what is known as the ratification contract of July 31, 1897.

This contract had the following provision in it referring to the issuance of stock provided for in the contract of May 10, 1889 (vol. II, p. 508) :

"But it is expressly provided that so much of the said contract (contract of May 10, 1889), a copy of which is hereto attached, as relates to the issuance and the distribution of the capital stock of the said Des Moines Company, is no longer binding, and that the capital stock of the said Des Moines Company is held as follows:

The purchasing committee of the Wabash, St. Louis & Pacific Railway Company, 500 shares.

The Des Moines, Northern & Western Railroad Company, 1,000 shares.

F. M. Hubbell & Son, 2,500 shares.

Of the above shares belonging to said purchasing committee, two shares stand upon the books of the company as follows: Joseph Ramsey, Jr., 1 share; and H. L. Magee, 1 share.

Of the shares belonging to the Des Moines, Northwestern Railroad Company, two shares stand upon the books of the company as follows: A. B. Cummins, 1 share; and F. M. Hubbell, 1 share.

Of the shares belonging to said F. M. Hubbell & Son, five shares stand upon the books of the company as follows: F. M. Hubbell, 1 share; F. C.

Hubbell, 1 share; C. Huttenlocher, 1 share; H. D. Thompson, 1 share; A. N. Denman, 1 share."

This contract was signed by the plaintiff, The Wabash Company, by O. D. Ashley, president, as well as by the Des Moines Union Railway Company and the Des Moines, Northern & Western Railroad Company.

Its execution was authorized and ratified at a meeting of the directors of The Wabash Company held October 5, 1897, and a copy of it spread upon the records of that company (ex. 237, vol. IV, p. 1540). Its execution was also ratified at a meeting of the board of directors of the Des Moines, Northern & Western Railway Company, predecessor of the Chicago, Milwaukee & St. Paul Railway Company, on September 7, 1897 (ex. 145, vol. IV, p. 1357).

The things to which we have called attention are only a portion of the things sustaining the proposition that the defendants were at all times authorized to understand that the ownership of the terminal property by the defendant company was conceded and recognized at all times by the complainants and their predecessors.

The court can open this record at any place and find evidence to sustain this theory.

It seems hardly worth while to discuss the question of whether or not the defendants relied upon these acts and representations of the complainants and their predecessors, and whether they changed their position relying thereon. Mr. Hubbell testified as to their reliance and there is no evidence to dispute it, and it is undisputed that the defendants, F. M. Hubbell and F. C. Hubbell, parted with their money for this stock, and that they have devoted a great share of their lives to the conservation and building up of the terminal prop-

erty without hope of reward except such as may grow out of the increase in the value of the stock.

The time and effort spent by the Hubbells in conserving, extending and transacting the business of the terminal company is no small or insignificant item. The testimony of Mr. F. M. Hubbell as to the services performed by him appears in volume III, commencing at the bottom of page 1036 and continuing to about the middle of page 1039. According to his testimony, he has been active in financing the defendant company, in extending and building up its property, in negotiating contracts for tenant companies other than complainants and their predecessors, and in many other ways has helped to develop the property. The testimony of defendant F. C. Hubbell on this subject appears commencing near the bottom of page 1195 and extending to about the middle of page 1197 of volume III. An examination of this testimony and the voluminous correspondence and other documents contained in defendants' book of exhibits will disclose the fact that Mr. F. C. Hubbell, who became president of the defendant company in January, 1892, has ever since said date devoted substantially all his time to the prosecution of its business. While his title has been that of president, he has in fact been performing the duties of general manager and purchasing agent. Not only this, but the devotion of the Hubbells to the interests of the Des Moines Union, the satisfactory character of their services, the success that has attended their efforts to develop the property and promote its interests, or the time and effort devoted by them thereto, is not, and cannot be questioned by the complainants.

IV.

THE COMPLAINANTS ARE ESTOPPED BY
THEIR LACHES FROM THE BRINGING AND
MAINTAINING OF THIS SUIT.

For the purpose of this question it is necessary to refer to the statute of limitations of the State of Iowa. Section 3447 of the Code of Iowa, 1897, provides:

“Actions may be brought within the times herein limited, respectively, after their causes accrue and not afterwards, except when otherwise specially declared. • • •

Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years.”

As we understand the doctrine of laches, the cause of action contained in this bill would be barred at the end of five years from the time it accrued, unless complainants should allege and prove facts which would make it inequitable to follow the rule of law on that subject.

The subject of laches as applied to this case, and the facts bearing thereon, have necessarily been inferentially discussed in our entire argument, and specific reference to the doctrine as applied to the amendments to the articles of incorporation of April 8, 1890, has been made in our discussion of those amendments. We may, therefore, include a more general discussion of the subject here.

As we understand complainants’ theory, one of their claims is that the property in controversy is charged

with a trust in their favor. It is necessary, then to consider the character of the alleged trust, because if the trust is an express one then the statute of limitations does not commence to run until there is a disclaimer of the trust, but if the trust is an implied one the statute of limitations commences to run and therefore the doctrine of laches applies at the time the trust relation attached.

In order to determine the character of this alleged trust, it is necessary to consider the title to the property in controversy, and the law of the State of Iowa, in which the property is situated, with respect thereto.

The rule on this latter subject is stated by this court in

Kerr v. Moon, 9 Wheat. 565,

in the following language (p. 569) :

"It is an unquestionable principle of the general law that the title to and disposition of real property must be exclusively subject to the laws of the country where it is situated."

Again, in the case of

McCormick v. Sullivant, 10 Wheat. 192,

the court, speaking of the title to certain lands in the State of Ohio, said (p. 201) :

"By the law of the State of Ohio, lands lying in that state may be devised by last will and testament in writing, but before such will can be considered as valid in law it must be presented to the court of common pleas of the county where the land lies for probate and be proved by at least two of the subscribing witnesses. If the will be

proved and recorded in another state according to the laws of that state, an authenticated copy of the will may be offered for probate in the court of the county where the land lies, without proof by the witnesses, but it is liable to be contested by the heirs at law as the original might have been.

It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which the title to it can pass from one person to another.”

Having determined that the title to this property depends upon the law of the State of Iowa, and therefore the question of whether or not it is subject to a trust, and if so, the character of the trust, must be determined by such law, let us examine the statutes and decisions of Iowa.

Section 2918 of the Code of 1897, which has been in force since long before the conception of the terminal scheme, provides as follows:

“Declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law.”

Under this section, clearly the property in controversy is not charged with an express trust in the hands of the defendant company, because no declaration of trust was ever executed by it as provided by this statute.

But what we understand complainants to claim is that by reason of certain provisions in article 2 of the

original articles of incorporation of the defendant company, and by reason of incorporating therein as a preamble thereto the contract of January 2, 1882, the property in controversy in the hands of the defendant company is charged with a resulting trust.

As we understand the rule with respect to resulting trusts, the statute of limitations commences to run at the time of the creation of the trust, or, to apply the doctrine of laches in determining the time within which the trustee will be protected, the time commences to run at the time of the creation of the trust.

In the case of

Boone v. Chiles, 10 Pet. 177, 222,

the court said:

"Though time does not bar a direct trust as between trustee and *cestui que trust*, till it is disavowed; yet where a constructive trust is made out in equity, time protects the trustee, though his conduct was originally fraudulent and his purchase would have been repudiated for fraud. * * * So where a party takes possession in his own right and was *prima facie* the owner and is turned into a trustee by matter of evidence merely."

And in the case of

Speidel v. Henrici, 120 U. S. 377, 386,

the court said:

"In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law."

But whatever the rule may be with respect to the character of the alleged trust in question, or when the statute commences to run, as applied to implied or resulting trusts, the rule is established by all the authorities, that the time commences to run at least as soon as there has been a repudiation of the trust. As to this proposition, we will not take the time here to quote from the authorities, but a few of them will be found in our brief.

It is clear from the record in this case that if the property in controversy was ever charged with a trust in the hands of the defendant company, that trust was expressly repudiated on April 8, 1890. We have already called the court's attention to what occurred on that date, and we may here content ourselves with summarizing it as follows:

1. On that date the defendant company, at a meeting of its stockholders, eliminated from its articles of incorporation the contract of January 2, 1882.
2. It amended its articles of incorporation by eliminating therefrom all those provisions by which it had been attempted to restrict the power of the defendant company with respect to the alienation of its property, or which in any way qualified the defendant's title.
3. It amended its articles of incorporation so as to deprive complainants' predecessors of the power to nominate the members of the defendant's board of directors.
4. It passed resolutions expressly declaring that the defendant company was the absolute owner of the property in controversy.

5. The amendments to its articles of incorporation were properly executed, filed and recorded, and notice thereof was published as required by statute.

6. Not only did complainants and their predecessors have the notice of these transactions with which they were charged by reason of the execution, filing and recording of these amendments, and giving notice thereof, but at the next annual meeting of the stockholders of the defendant company at which complainants' predecessors were present as stockholders, the proceedings of April 8, 1890, were read, so that their special attention was called thereto.

7. The affairs of the defendant company were carried on under these amendments to the articles of incorporation for more than seventeen years after the adoption of these amendments and these resolutions, before any complaint was made thereof.

It appears, therefore, that seventeen years prior to the commencement of this suit the defendant expressly repudiated any trust in relation to this property, if one existed, and therefore, under the rule as established by the courts, the complainants must fail on account of their laches.

But the doctrine of laches, as applied to this case, may be considered in even a broader aspect. The doctrine as laid down in

Pomeroy's Equity Jurisprudence, Vol. 5, Sec.
23,

is as follows:

"No doctrine is so wholesome when wisely administered as that of laches. It prevents the res-

urrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor, because its proper application works out justice and equity, and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many. The equitable rule that one who is negligent shall not have relief, and the barring of proceedings after the lapse of stated periods of time by statutory enactments, are alike based upon public policy, as well as upon considerations affecting only individual rights. It is to the public interest that stability in the title to property should exist, and that all uncertainties and disputes as to the ownership of the land should be speedily put at rest. Hence, there lies at the foundation of the principle that the lapse of time will become a defense to the title of one in possession of property not only consideration for his personal rights and equities, but also a recognition of the higher public interests which can only be subserved by putting at rest, as speedily as possible, all doubts and uncertainties touching the title to realty to which end it is the duty of courts to discourage delays in the assertion of conflicting claims thereto."

The rule was laid down and applied by this court in the leading case of

Galliker v. Cadwell, 145 U. S. 368,

which involved the title to some real estate in the City of Tacoma in the following language:

*** The laches of the appellant is such as to defeat any rights which she might have had, even if these prior questions were determined in her favor, and in this respect it is worthy of notice that there has been in a few years a rapid and vast change in the value of the property in question. It is now an addition to the City of Tacoma. The census of 1880 showed that to be a mere village, the population being only 1,098. The census of 1890 discloses a city, the population being 36,006. Of course, such a rapid increase during this decade implies an equally rapid and enormous increase in the value of property so situated as to be an addition to the city, and the question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that because of the change in condition or relations during this period of delay it would be an injustice to the latter to permit him to now assert them. ***

But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some

change in the condition or relations of the property or the parties."

Applying the principle announced in this case to the case at bar, we are unable to conceive how counsel for complainants are going to avoid its application. It will be noted that the three principal elements which form the basis of the doctrine are:

First. The party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum.

Second. That by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned.

Third. That because of the change in condition during the period of delay it would be an injustice to the latter to permit him to now assert them.

The rights of complainants and their predecessors with respect to the matters set up in the bill, if any they ever had, have been known to them since their inception. The contract of 1882; the fact that the Wabash Company and General Dodge advanced the money to originally acquire the terminals; the incorporation of the terminal company; the resolutions and deeds of 1885, 1887 and 1888; the contract of May 10, 1889, and the ratification thereof July 31, 1897; the amendments to the articles of incorporation of April 8, 1890, and the resolutions passed at that time; have all been known by complainants and their predecessors from the time of such transactions, because they were all parties thereto and had both actual and constructive notice thereof. During all these years the terminal

company has treated this property as its own, and with such knowledge on the part of the complainants and their predecessors, the management of the affairs of the terminal company has been controlled by its stockholders. There has been no reason why complainants or their predecessors could not at any time have brought their suit in the proper forum, to establish the rights set up in the bill, if the same existed. So that the first element supporting the doctrine conclusively appears.

For nearly twenty years prior to the bringing of this suit, the terminal company had possession of this property under contracts and deeds which purported to give it an absolute title. For nearly twenty years, with the knowledge and acquiescence of the complainants and their predecessors, the terminal company has treated this property as its own. For nearly twenty years the affairs of the terminal company have been managed and controlled by its stockholders in the ordinary and usual way. For more than sixteen years prior to the bringing of this suit, the terminal company, with the knowledge and acquiescence of complainants and their predecessors, have been acting under the articles of incorporation as amended April 8, 1890, at which time the contract of 1882 was formally repudiated.

Under these circumstances, the respondents in this case had good reason for believing that the rights which are set up in the bill, if they ever existed, were worthless and had been abandoned, not only because of the failure of the complainants and their predecessors to bring their suit in the proper forum to establish their rights, but also because they treated this property during this period as the absolute property of the ter-

minal company. The second elementary basis of the doctrine, therefore conclusively appears.

Both the condition of this property and the relations of the parties thereto have been changed during this time. Commencing with May 1, 1888, the date when the terminal company took possession of the property, that company has from time to time acquired additional property as a part of the terminal, paid for it with its own funds, improved the same, and the property, because of the fostering care of the terminal company and its officers, especially the respondents, the Hubbells, has increased very largely in value, as shown by the increased and increasing "surplus earnings" (see p. ____ of this brief). The relation of the stockholders to the property has changed. The Hubbells have bought stock of the predecessors of both complainants; and the complainants and their predecessors have had the benefit of the money and still retain it. The Hubbells have sold their interest in the northern lines to the complainant, the Chicago, Milwaukee & St. Paul, upon the theory that such northern lines owned one-fourth of the stock of the terminal company, and that five-eighths of it was owned by F. M. Hubbell & Son. For twenty years the two Hubbells have devoted a very large portion of their time in earning for and developing the property of the terminal company, without any compensation, except what they receive by reason of the increase in the value of their stock. To enter a decree such as is prayed for in the bill would not only be inequitable and an injustice to the respondents in that it would deprive the terminal company of property which it has bought under a contract with the complainants and their predecessors and for which it has paid the full market value, and deprive

the Hubbells of what they have contracted and paid for, and the fruits of their labor for more than twenty years, but would give to the Chicago, Milwaukee & St. Paul Railway Company a large and valuable property for which it has never paid a cent and which it never suspected it was purchasing, and which it was plainly told it was not purchasing, and would give to the complainant, The Wabash Company, property which it and its predecessors have sold and for which it has received and retained the price. The third element of the doctrine is, therefore, established.

The case of

Abraham v. Ordway, 158 U. S. 416, 420,

involved the title to some real estate in the City of Washington. The court discussed the doctrine of laches quite fully, and in holding that under this doctrine complainant's suit was barred, says, in part, as follows:

"The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitations; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case, by granting the relief asked. It will in such case decline to extricate the plaintiff from the po-

sition in which he has inexcusably placed himself, and leave him to such remedies as he may have in a court of law."

It will be noted that in the case at bar there is no attempt, either in the bill or in the testimony, to furnish any excuse for the delay in bringing this suit.

Suits to establish implied trusts fall within the class of cases in which the federal equity courts follow the courts of law in applying the statute of limitations.

Beaubein v. Beaubein, 23 How. 190, 207.

Speidel v. Henrici, 120 U. S. 377, 386.

Riddle v. Whitehill, 135 U. S. 621.

The case of

Speidel v. Henrici, supra,

was one in which was involved an accounting for a trust fund. Upon the doctrine of laches, we quote from the opinion of the court (p. 386) as follows:

"In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law. *Hovenden v. Annesley*, 2 Sch. & Lef., 607, 634; *Beckford v. Wade*, 17 Ves. 87. In such a case, Chief Justice Marshall repeated and approved the statement of Sir Thomas Plummer, M. R., in a most important case in which his decision was affirmed by the House of Lords, that 'both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate, for a period of twenty years (supposing it the case of one who must within that period have made his claim in a court of law, had it been a legal estate), under no dis-

ability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations, if, during all that period, the possession has been under a claim unequivocally adverse, and without anything having been done or said, directly or indirectly, to recognize the title of such rightful owner by the adverse possessor.' *Elmendorf v. Taylor*, 10 Wheat. 152, 174; *Cholmondeley v. Clinton*, 2 Jas. & Walk. 1, 175, and 4 Bligh, 1.

Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence: where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' *Smith v. Clay*, 3 Bro. Ch. 640, note. This doctrine has been repeatedly recognized and acted on here."

For a full discussion of the principle as applied by this court, see

Penn M. L. I. Co. v. Austin, 168 U. S. 685, 696.
Baker v. Cummings, 169 U. S. 189, 206.

To sum up the doctrine of laches as applied to this case:

A cause of action of this character is barred by the statutes of the State of Iowa five years from when it accrues.

The rule in the federal equity court is that a cause of action arising under the laws of the State of Iowa will be barred by laches at the expiration of five years, unless the complainants show some good excuse for not bringing their suit within that time. No such excuse is offered in this case.

So far as the Wabash Railway Company is concerned, no trust ever existed in favor of that company, unless it was because of the fact that that company furnished a large proportion of the money with which to purchase the original properties. This would be a constructive trust against which the statute ran a long while ago.

If it be claimed that an express trust was created in favor of the three railroads parties to the contract of 1882, that trust was terminated by the organization of the terminal company, followed by the passage of the resolutions of 1887, and the execution and delivery of the deeds to the terminal company in pursuance thereof, the payment of the purchase price, and the execution of the contract of 1889 and the ratification contract of 1897.

Any possible claim for an express trust was expressly repudiated by the amendments to the articles of incorporation of April 8, 1890, which were placed upon record and published as required by law, and of which complainants and their predecessors had both actual and constructive notice. In any view of this case the doctrine of laches applies.

V.

THE SALE AND TRANSFER OF THE TERMINAL PROPERTY TO THE TERMINAL COMPANY WERE NOT VOID AS AGAINST PUBLIC POLICY.

Counsel for petitioners assert the principle which we accept as sound that a railroad company may not disable itself from the performance of its public functions and hence they conclude it may not divest itself of any property which it has acquired for public purposes. The conclusion does not follow.

Public policy requires nothing of the kind and general usage is to the contrary.

There is scarcely a railroad company in the country that has not from time to time parted with some of its property, and has performed its public functions all the better for so doing. Tracks have been taken up and the land has been sold or abandoned, in order to get a new line with lower grades, with less curvature or to diminish the length of the line between two places.

For a proper terminal system in a large city, which means a unitary system, it is absolutely necessary that the lines entering it part with some of their urban property. Union terminals were not and could not well be built in the beginning of railroad construction. It was in Des Moines as in other cities. The different lines of railroad reaching it or passing through it, were not all built at the same time, but at intervals of years. Each line as it came in acquired its own terminals, which proved upon many accounts to be a bad plan. It was expensive in construction and in operation. It was inconvenient to the traveler.

sightly and dangerous to the inhabitants. And so Union Terminals suggested themselves and everywhere were countenanced and encouraged by statutory enactment.

The City of Washington has its Union Terminals and this involved withdrawing from railroad use large tracts of land in the city. When the new station building was erected, the old stations were abandoned. And this was done under sanction of Acts of Congress.

The respondent, the Des Moines Union Railway Company, has for itself and for what it has done and is doing, the sanction of the statutes of Iowa as expressly declared by the Supreme Court of the State in the case of *Morgan against the Company*, 113 Ia. 561.

Union Terminals being desired by the railroad companies and by the public whoever will may participate in creating them. A corporation for the purpose is practically indispensable. And it must be a distinct institution. The railroad companies contribute money or property. Individuals may do the same. But this will not be in equal proportion. Bonds or stocks or both are issued in consideration of the money or the property contributed and appropriately in the measure of the contribution. The contributors are entitled to a return upon their investments. They are property in this respect as is any other form of investment, subject only to the restriction, which is not applied to property, not charged with a public use, that the return is not all they can get, if left entirely to themselves, but that the return may be only a reasonable one upon the value of the property.

So here the railroad companies did not disable themselves from the performance of their public duties. They simply contributed, as it was to their interest

and the public interest to do, to the construction of Union Terminals in the City of Des Moines.

U. S. v. Terminal Ass'n, 224 U. S. 401.

The cases cited by counsel, Thomas vs. Railroad Co., 101 U. S. 71, and Central Transportation Co. vs. Pullman Co., 139 U. S. 26, are not in point, because of the radical difference in the facts.

And here are transactions completed many years ago and the courts will not disturb them upon the suggestion of want of power in the parties at the time.

In St. Louis R. R. Co. vs. Terre Haute R. R. Co., 145 U. S. 393, the contract by which one of the companies transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the other, was assailed for want of power to make it. Assuming that the contract was *ultra vires*, the Court said, p. 406:

"It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts not of last resort, and present no sufficient reasons for maintaining this suit. * * *

The general rule, in equity, as at law, is *In pari delicto potior est conditio defendantis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in

equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall, 349, 355; *Spring Co. v. Knoulton*, 103 U. S. 49; Story Eq. Jur., sec. 298.

While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. Adams on Eq., 175. Consequently, it is well settled, at the present day, that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense. • • •

When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, above cited; *Ayerd v. Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be con-

sidered the voluntary act of the grantor. • • •

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the State, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was in *pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. *And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches.* *Harwood v. Railroad Co.*, 17 Wall. 78; *Graham v. Birkenhead &c. Railway*, 2 Hall & Twells 450, S. C. 2 Mun. & Gord. 146; *Ffooks v. Southwestern Railway*, 1 Sm. & Gif. 142, 164; *Gregory v. Patchett*, 11 Law Times (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co. v. Knowlton*, 103 U. S. 49; *Logan County Bank v. Townsend*, 139 U. S. 67, and vases there cited.

But the case is one in which, in the words of Mr. Justice Miller in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317. See also *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434, 468, 469; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 56, 57, 61."

The rule established in the cited case has never been repudiated or departed from or modified by any subsequent opinion of the Supreme Court of the United States or any other court of last resort, and is the established law in this forum.

THE ORAL TESTIMONY.

The court will observe that we have made little use of the oral testimony in arguing this case. The transactions from the very beginning down to the time of the trial of this suit are fully shown by contemporaneous documentary evidence, and about this documentary evidence there is no dispute, as it was all agreed to by counsel. It has been our thought that oral testimony of transactions taking place anywhere from fifteen to thirty years prior to the time of taking the oral testimony was of very little value as compared with docu-

mentary evidence of the same transactions about which there is no dispute. And this is especially true when the testimony is with respect to ordinary transactions of very busy men, such as was the case in the case at bar.

The unreliability of the testimony of Mr. Hays, Colonel Blodgett, and Mr. Pryor is demonstrated by an examination of their evidence. In the first place, the questions propounded to them are ingeniously stated in order to permit them to testify to their conclusions. Their cross examination discloses the fact that when it comes to any fact they have no reliable recollection about it. For instance, take the testimony of Colonel Blodgett: He testified that he didn't know of the sale of stocks and bonds by the Purchasing Committee to Mr. Hubbell for a good many months after the sale had taken place (vol. II, p. 371), and yet he drew the contract providing for the sale (ex. 298, vol. II, p. 1600). Now Colonel Blodgett was honest in this matter, but he had simply forgotten it.

Take the testimony of Mr. Hays (vol. II, p. 229). An examination of it will disclose that he attempted in his direct examination to testify to certain facts, but his cross examination shows that he had no accurate recollection about them.

The same is true with respect to the testimony of Mr. Pryor, who attempted to testify to things which happened in Des Moines many years before he was ever in Des Moines.

With reference to the testimony of Mr. F. M. Hubbell, his testimony would be of some value if it were necessary to use it, because it was based upon entries which he made in a diary at the time the transactions occurred and with which he refreshed his recollection,

but we have scarcely referred to his testimony because the same facts are so much more satisfactorily shown in the documentary evidence.

Counsel for the Wabash lay great stress upon the oral testimony of the parties that they didn't intend by the amendment to the articles of April 8, 1890, to affect the title to the terminal property. The fact is that none of them at the time thought there was any question about the title to the terminal property. They all understood that the title was in the terminal company and they simply were amending these articles and the record for the purpose of having them conform to the facts as they all understood them.

TITLE OF HUBBELL AND SONS TO THE SHARES OF STOCK.

Counsel for petitioners challenge the title of Hubbell and Son to the stock they hold in the Des Moines Union, and charge that the shares were obtained by fraud from the Des Moines, northern and Western Railway Co. (Brief, p. 171 *et seq.*)

Nobody interested in the last named Company as creditor or shareholder complains and why should the Milwaukee which acquired its interest long after and with full knowledge of the facts?

The consideration paid may seem small at this time, but that was in January, 1894, when the prospects for all these properties were very unpromising. But if it was not a fair price, that was the grievance of shareholders or creditors. General Dodge was next to the Hubbells the principal shareholder and was advised of the facts at the time and invited to share in the purchase, but declined to do so (Rec. Vol. III, p. 1018).

Other shareholders were all satisfied and in the twenty-six years that have passed, no note of discontent has been heard from any of them.

The creditors have all been paid. The Metropolitan Trust Company has no complaint to make. It never had a lien upon this stock for it was in express terms excluded from its mortgage (Rec., Vol. II, p. 637). Moreover, the mortgage debt of the Metropolitan Trust Company has long since been paid.

All the grievances complained of by counsel are the concern of people who feel no grievance and who do not complain.

The Wabash of course had no right to complain; it had no interest in this stock at that time. Indeed, fifteen hundred shares of it had once been held by the Wabash and had been sold by it. And in the ratifying contract of 1897 this shareholding of the Hubbells in the Des Moines Union was explicitly set forth, recognized and affirmed.

This argument was in principal part in type when the brief for petitioners was received and in the main we must rely upon what we have set out in anticipation of its argument. Some matters of omission and of commission, however, we call attention to.

REPORTS TO THE EXECUTIVE COUNCIL.

There is an attempt to make much of the reports made by the Des Moines Union to the Executive Council for purposes of taxation.

These reports will be found on pages 719 to 724, volume II, of the record.

These reports were made upon blanks prescribed by the state. Schedule 5 calls for a statement of "gross

earnings for the year," and is followed by a form divided into columns headed:

Name of line	a
From passengers	b
From freight	c
From express service	d
From mail service	e
From telegraph service	f
From track rent	g
From car rent	h
Miscellaneous	i

Now, the Des Moines Union, while incorporated in name as a railway company and being an operating company, had no earnings from any of these sources because it did not at that time do an independent business in any of these respects, but was rendering a terminal service for which it received compensation in the manner provided in the contract subsisting between it and the railway companies, and in explanation of the fact that it had no earnings to report of the kind called for, it made the statement that it was simply "a representative company," acting as an agency at Des Moines for the three railway companies. We conceive this characterization to be an entirely appropriate one for any terminal company, as it certainly is an agency through which the railway companies perform a part of the functions which they have undertaken to perform, and in respect of these operations performed by a terminal company, the terminal company is responsible as a principal to the shipping or traveling public. And as to each one of the railway companies using a terminal railway, that terminal is a part of its line in respect of each and all of the transactions in which it employs that terminal. So the terminal company may

well be called a representative and an agent, and some explanation was required to show why it had no specific earnings of the kind called for by the report, and there is nothing in this recital which could possibly operate by way of estoppel in behalf of any one. Its effect as evidence can be of no force whatever, because in the same report the Des Moines Union Railway Company states itself to be the owner of all of the terminal property which is here in question. The case is parallel with that, for example, of the Pullman Company, which, as to the public, is an agency of the railroad companies over which its cars are operated, employed by the railroad company as a convenient means of furnishing certain facilities to the traveling public; and the railroad company is responsible to its passengers in like manner and to the same extent as if the railroad company itself owned and operated the cars. It is a matter of general knowledge that these cars are owned by the Pullman Company, and also that the operation of the car itself, as distinguished from the operation of the train, is by the Pullman Company and not by the railroad company; but the fact that the Pullman Company is the agent of the railway company and that the railway company is responsible for its acts, does not at all impair the ownership of the cars by the Pullman Company, and neither does the fact of ownership of these cars by the Pullman Company and the operation of them by that company, relieve in any sense the railroad company from responsibility to the passenger.

Counsel say, p. 149, that:

"It is significant that the report signed and verified on February 16th, 1894, immediately succeeding the transaction of January 29, 1894, by which

Hubbell acquired his five-eighths interest in the Des Moines Company, states that the Des Moines Company "is the owner of the property hereinbefore described" (Rec., p. 724).

This is a plain intimation that the prior reports contained no such statement, else it could not be significant.

The record, page 719, contains a stipulation for the purpose of abbreviation that all the reports from 1888 to 1894 are in substantially the same form and "that each contains * * * a description of its real and personal property." The stipulation is further to the effect that the "real property so described includes by specific description each of the lots and parcels of ground described in the following deeds," being the deeds by which How, Dodge, and the St. Louis, Des Moines and Northern Railway Company and the Des Moines & St. Louis Railroad Company had made the conveyance of the terminal properties to the Des Moines Union Company, and including all the land the Des Moines Union had acquired up to that time.

Of course, if there was significance in the fact that the reports first included a statement that the Des Moines Union owned this terminal property, after Hubbells acquired these shares, then too there was significance in the stipulated fact that the reports made by the Des Moines Union from the very first, that made for 1888, and for each and every year thereafter, contained the same statement. But the significance is of another kind.

The change made in the reports was simply that made under the head of general remarks. As to this Mr. Cummins says:

"A. I had nothing whatever to do with the operation of the Des Moines Union Railway Company; knew nothing about the details of its operation. At the time of the first report to which my attention was called, was presented to me, Mr. Hubbell, F. C. Hubbell, who I think then was President of the Company, was away from Des Moines, and I signed that report without even reading it. I think I ought to apologize to everybody for having done it; but I was a busy man, and it came up to me in a perfunctory sort of a way, and I did it. When the other came on, in some way or other, I don't remember how it was, my attention was called to that subject, and I myself prepared and put on it, my recollection is, the slip pasted over; anyhow, it was put in as a substitute for the remarks that were in the report as it came to me, and which were probably identical with those contained in the previous report that I had signed."

The case of the Chicago, Milwaukee & St. Paul Company vs. Des Moines Company, 165 Ia. 35, is cited on a question of estoppel but with suggestions of bad faith on the part of the Hubbells. The issues in that case are in no sense involved here and we have only to say that the claim of the Des Moines Union was based upon the facts that it had purchased and paid for the portion of the Railway in question, had expended large sums in maintaining and improving it and that when the Milwaukee bought the Northern lines, it was advised that the Des Moines Union claimed ownership of the tract between Farnam and Twenty-eighth Streets. The good faith of the Hubbells in attempting to sustain the ownership of the Des Moines Union in that litigation is evidenced by the fact that the decree of the trial court adjudged the title to be in the Des Moines Union and

there was a dissenting opinion in the Supreme Court approving that title.

There are a number of matters as to which it seems to us, counsel should have stated their views. Among these are the following:

(1) If the organization of the defendant Company was for the *sole* purpose of providing the corporate trustee referred to in the contract of 1882, as claimed on pages 99-100 of their argument, why did they organize a corporation having the power and assuming the obligation of a Railway Company and why did they organize a corporation for pecuniary profit?

(2) If it was the purpose to transfer to the defendant Company simply the legal title to the Terminal property then why the following:

(a) Why did the Des Moines Northwestern Railway Company, in whose name the title to no part of the Terminal stood, in January, 1895, pass a resolution authorizing its officers to transfer to the Terminal Company all of its interests in the Terminal Company of whatever kind and character?

(b) Why did the Northwestern Company, the Northern Company and the St. Louis Company, each, in their resolutions of January, 1885, authorizing their officers to convey this property, use this language:

"convey, assign and transfer to said company all its right, title and interest of whatever name and character in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines east of Farnham Street in said City now held, enjoyed or claimed by either or all of the sig-

natories of said contract of January 2nd, 1882, or any agent or trustee thereof purchased, acquired, or held in pursuance of said contract." (Rec., Vol. II, p. 427.)

(e) Why did Col. Blodgett, whose integrity and ability are unchallenged, who had lived these transactions and who knew the intention better than can counsel or the Court, in preparing the deed of the St. Louis Company in carrying out these resolutions, prepare a warranty deed, and why did he formulate it so as to convey not only the property which stood in the name of that Company but also "all of the real estate within the City of Des Moines • • • also all its embankments, bridges, side tracks, • • • all its railroad property acquired or to be acquired and everything appurtenant to said railroad" (p. 458).

(d) Why did the Northern Company in its deed after describing the property which stood in his name use the following language:

"Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest in the above described property, possession, claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, etc." (p. 456).

(e) Why was it provided in the original articles of incorporation of the defendant Company that its capital stock should be issued in payment for the Terminal property?

(f) Why was it recited in the contract of May 10th, 1889, that the defendant Company owned this property?

(3) If the contract of May 10th, 1889, was supplemental to the contract of January 2, 1882, why does it not recite this fact?

INACCURATE STATEMENTS AS TO WHAT THE RECORD CONTAINS.

On page 35 of the brief, counsel say the resolutions of November 5th and 8th, 1887, were addressed to the same object as the resolution of January 1, 1885, namely: the transfer of the trust properties to the Des Moines Company as corporate trustee. Substantially the same assertion is made at numerous other places in the brief. This is not true. The resolutions of January, 1885, do not purport to authorize Howe and Dodge as trustees or otherwise to convey any property but are restricted to the authorization of the three Railway Companies to a transfer of the ownership of the properties. The resolutions of 1887 are directed solely to Howe and Dodge as trustees except that the St. Louis Company is again authorized to transfer the ownership.

On pages 44 and 45 and at several other places in the brief it is asserted that at a meeting of the directors of the Des Moines Union Railway Company, held March 31st, 1888, a resolution was passed directing Col. Blodgett to prepare a thirty-year contract supplemental to the contract of January 2, 1882, and that the contract of May 10th, 1889, was prepared and executed in pursuance of that resolution and therefore counsel denominate the contract of 1889 as the "sup-

plemental contract." The facts are not as asserted by counsel. The resolutions are as follows:

"Resolved, That the Des Moines Northwestern Railway Company, the St. Louis, Des Moines & Northern Railway Company and the Des Moines & St. Louis Railroad Company, or their successors or assigns, shall pay the operating expenses, taxes and interest on bonds that are or may be issued, after deducting any amount received from other sources for *rental*, pro-rated on a wheelage basis, and that said payments, including interest charges, shall be made monthly, and when for any reason, said Companies, or either of them, shall be or become in default in the making of any such payment, or any part thereof, on the day when the same shall be or become due and payable as aforesaid, interest shall be collected upon amount so in default to the time same shall be fully paid and satisfied.

Resolved, That Col. W. H. Blodgett be requested to prepare an agreement for three years from May 1st, 1888, based on the above resolution and covering in detail the conduct and operation of the Des Moines Union Railway Company. Said agreement to be approved and executed by all the lines now holding an interest in the property.

Said agreement shall provide that if at the end of six months from date of same, either party to the contract shall feel that the terms of same are unjust to them, and give notice to that effect, it shall be a matter for readjustment.

Resolved, That the terms and conditions on which the several lines now interested, or which may hereafter become interested, shall enjoy the use of these terminals, be fully set forth in a supplemental agreement to be made and executed between the Des Moines Union Railway Company and each of the lines using the said terminals."

The first contract mentioned is not to be for *thirty* years, but for *three* years. And the second contract which is referred to as supplemental is manifestly to be supplemental to the three years' agreement. The agreement of 1882 is not mentioned from beginning to end of the proceedings. The actual conclusion of the matter was that the parties determined to make one bite of the cherry and so they drew up the contract of May 10th, 1889, to be effective from May 1st, 1888, and to run for thirty years. And this contract was comprehensive and complete in itself and not supplemental to anything else. And in no document and in no letter or record entry is it referred to as supplemental. That designation came in with this litigation and is the contribution of counsel.

On pages 26 and 27 counsel state the provisions contained in the Articles of Incorporation of the defendant company. They call the defendant always the "Depot Company." They put the name in quotation marks and italicize it as if it were quoted from the articles.

The fact is that the defendant Company is not referred to as the "*Depot Company*," in the Articles of Incorporation, the amendments thereto, or in any resolution, contract, deed, or other document found in the Record.

Referring to the Stockholders' Meeting of April 8th, 1890, at which the Articles of the defendant Company were amended, counsel, on page 55, say it is conceded that no one held a proxy representing the persons and interests whom the Record showed were represented at that meeting and in support thereof refer to Mr. Hubbell's testimony on pages 1165-9. What Mr. Hubbell testified to was that at the time of taking his deposi-

tion in May, 1911, more than twenty-one years after the Meeting of April 8th, 1890, he was unable to find these proxies. Again referring to this same Meeting of the Stockholders, counsel on page 126, say, "no conference, however, took place between Blodgett and Cummins; Cummins alone redrafted the proposed amendments to the Articles." With respect to this Senator Cummins testified "it (the draft of amended articles of incorporation) was submitted to Col. Blodgett and I had a conference with him; possibly more than one" (p. 1201).

On page 90 counsel say, "after the concentration of the trust properties in the Des Moines Company no equitable tenant in common in such trust properties ever conveyed, released or otherwise relinquished to the Des Moines Company its equitable estate therein." This statement is substantially repeated on pages 108 and 153. While it would not be correct to say that so far as these statements assert that the three railway companies did not after once transferring this property to the defendant Company, again transfer it, they are not true, these statements are misleading in that they tend to induce the belief that the three Railway Companies did not at any time transfer the ownership to the defendant Company.

Company.

The transfer of the ownership was the result of the resolutions of 1885 and 1887 and the deeds executed in pursuance thereof and the payment therefor by the Terminal Company. All these transactions were at or prior to the concentration of the ownership in the Des Moines Company.

Speaking of "surplus earnings," counsel say, on page 186, "although the Record does not show the

amount of these accumulations at the present time, the testimony having been taken a number of years ago, it seems proper to state to the Court that these accumulations now amount to approximately Two Million Dollars (\$2,000,000.00)." There is nothing in the Record to sustain this statement and it is not true as a matter of fact. The Record does show that a substantial sum is involved in this issue.

**DEFECTIVE STATEMENT OF AGREEMENT OF
1882.**

In their many references to and statements concerning the agreement of 1882, counsel for petitioners never quote, never mention and never refer to a significant clause in the tenth paragraph. This paragraph provides for the use of the terminal railroad by companies whose roads do not extend to Des Moines and that this may be had by any such company upon payment of a fair sum for rental and its proportion of the maintenance account." Up to this point counsel are free in quotation and comment. But the paragraph proceeds, "the rental to ensue to the Companies hereto in the same proportion as the original outlay." Here is a distinct assertion of proprietary right and interest. The Company that owns a one-half interest in the property is to receive one-half the rental, and the company that owns but one-fourth is to receive but one-fourth of the rental. The rental is not to go to the reduction of operating expenses, but is in the nature of what the parties later called surplus earnings. And so if they had organized a depot company on the plan of this agreement, the stock representing the property would have had the benefit of these rentals. True the

parties did not organize such a company and being all agreed they were not bound to do so, and so too they might subsequently agree as they did to a different disposition of this particular rental, but the clause goes to show that the contributions to the enterprise as invested capital, and as well the stock afterward issued on account of such capital investment, as such stock was to have a value as property. So all consideration of this provision of the agreement was studiously avoided by counsel.

So, too, counsel avoid all mention of the letter of Hubbell to Miller, February 22nd, 1894. They argue and assert by implication that the Milwaukee Company was not informed as to the shareholding in the Des Moines Union Company. This letter was written at the very beginning of the negotiations that resulted in the Milwaukee finally acquiring the Northern lines, and before it had invested a dollar or done anything in the premises. In this letter Mr. Hubbell says:

“The Des Moines Northern and Western Railway Company own one-fourth of the capital stock of the Des Moines Union Railway Company. The Wabash own one-eighth, and five-eighths is owned by individuals.”

To bring this letter into the discussion would make absurd any suggestion that the Milwaukee Company was not fully advised of the rights of Hubbell and Son and that it did not buy subject to those rights. So the letter was left out of consideration as the easiest way of dealing with it.

Counsel say that our position results in a disregard of the terms on which local aid was voted to the Northern line by some of the townships through which it

passed. It is not for the Milwaukee to make such a defense. If such an issue had any place here, the Milwaukee Company would have no standing, for it would have no right to the line. One of the conditions on which aid was voted was that "said railroad shall never pass under the control of any of the lines constituting what is known as the Chicago pool or of the Chicago, Milwaukee and St. Paul R. R. Company" (Rec., Vol. II, p. 789). As the people who voted the aid are not complaining of what has been done here, no one else has any warrant for assuming to speak in their behalf.

RELATION OF MR. CUMMINS TO THE TRANSACTION.

It is repeated over and over again in the brief of counsel that Mr. Cummins was the personal counsel of F. M. Hubbell and Son and in such way as to suggest that he acted in their behalf rather than in behalf of the Wabash and the Des Moines Union, whose counsel he also was, in the transactions in which he had part. But the evidence is conclusive that everything done or advised by him was done in the open, after long notice and full knowledge by all concerned. He did not come into the situation until in 1888. He had nothing to do with the contract of 1882 nor with the organization of the Des Moines Union, nor yet with the sale and transfer to it of the terminal properties. He did not draft the contract of 1889. Nor had he aught to do with the sale of the Des Moines Union stock to Hubbell and General Dodge. Col. Blodgett drew up the papers covering that transaction. The rough draft of the memorandum of sale of the stock is in evidence. (Rec., Vol. IV, p. 1600.) It is admittedly in part in

the handwriting of Hubbell and in part in the handwriting of Col. Blodgett (p. 1601). Mr. Cummins was not so much as present.

The important transaction in which Mr. Cummins had considerable part was the amendment of the Articles of Incorporation. This matter was months under way. It was under consideration at various meetings of the Company, stated and adjourned. It was the subject of correspondence and of discussion in personal conferences. The amendments were adopted only after grave consideration and the fullest deliberation and when the strong men of the interests other than Hubbell's were present, Col. How, for many years Vice President of the Wabash, and Hays, one of the ablest and most progressive railroad men in the country. General Dodge was not present in person, but he had been fully informed and he approved and was present by proxy. And when it came to the execution of the Articles in form for recording, General Dodge, Col. Blodgett, Col. How and Charles M. Hays signed and acknowledged the articles as officers and directors of the Des Moines Union. To say that these men were in any way misled or that they knew not what they did is the sheerest nonsense. They none of them ever said so. These men were all of them save Col. How, living while this suit was pending. The testimony of Col. Blodgett and Mr. Hays was taken. Neither of these men said that they did not understand the amendments at the time of their adoption or that any misrepresentations were made to them by anybody. Their recollection of matters is dim as is natural after so many years, but there is no impeachment of the integrity of anything that was done. And, indeed, the status of the Des Moines Union Company and the character of its

title to the property it held and the nature of its rights and interests therein were all fixed before Mr. Cummins came upon the scene.

The subtle suggestion of anything inviting criticism or distrust of his conduct is as baseless as the gross charges of the forgery of records made in the amended bill of complaint and abandoned without attempt at proof.

We pass now to a consideration of the question of "surplus earnings," the subject of the cross petition.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1919

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL, F. C. HUBBELL
and F. M. HUBBELL & SON,

Petitioners,

vs.
CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY and WABASH
RAILWAY COMPANY,

Respondents.

No. 279

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Eighth Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR PETITIONERS

STATEMENT.

In discussing the questions involved in this cross-petition for certiorari we will continue to designate the parties as we have done in the case involving the main issue, believing that this will avoid confusion, the Milwaukee and the Wabash Companies as petitioners or

complainants and the Des Moines Union Railway Company and the individual parties as respondents or defendants.

The issue here is as to what are known in the record as

SURPLUS EARNINGS,

being moneys received by the defendant company as compensation for switching services rendered companies other than the complainants or their predecessors, rentals from property owned by the defendant company and not at the time needed for terminal purposes, rental for station privileges, etc.

A very considerable portion of this fund was used to acquire additions to and make improvements on the terminal property, done by consent of all parties at the time. The unexpended balance of the fund, in the treasury of the defendant company on January 1st, 1907, the last date as to which we have testimony, was \$125,276.78 (Vol. IV, p. 1397). The record does not show the subsequent accumulations.

The question is who is entitled to this fund, the Des Moines Union Railway Company or the Milwaukee and the Wabash Companies?

This controversy involves the construction of the contract of May 10, 1889 (vol. II, p. 479). By the terms of this contract the defendant agreed, for the period of thirty years from May 1, 1888, to furnish to complainants' predecessors terminal facilities and certain terminal services. In consideration of this it was agreed:

“Section Three. Each of said parties of the second part for itself and its assigns, agrees to pay

to said party of the first part a sum of money to be ascertained as follows, to-wit:

1st. There shall be ascertained the amount required to pay five per cent interest upon the mortgage bonds of the party of the first part, one-twelfth of which, less any deduction hereinafter provided for, shall be payable monthly as herein-after specified.

2nd. At the expiration of each month, or as soon thereafter as practicable, there shall be ascertained the expenses of maintaining and repairing the property of the party of the first part, including the maintenance and repair of tracks, depots, round houses, engine houses, etc., during the preceding month. And in like manner there shall be ascertained the taxes, general or special, levied upon or against said property and paid during the preceding month, or to be paid during the next succeeding month, and the insurance, if any, paid during the next succeeding month.

3rd. There shall be likewise ascertained the costs and expenses of every nature connected with the operation of said terminal station, freight and passenger depots, depot grounds, round houses, transfers and other properties, which is to include every item of expense or disbursement incurred or made by the party of the first part not hereinbefore mentioned, except the expenses specified in Section Nine hereof.

Section Four. Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be deducted therefrom the amount, if any, which *other* railway companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month, and the remainder shall be paid by the parties of the second part in the proportion that the whelage of each of said parties bears to the entire whelage

of all said second parties during such preceding month."

The question is, whether the complainants are entitled to credit for the items making up this fund, such items not being items "which other railway companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof."

The Circuit Court of Appeals held that this fund belonged to complainants and it is this provision of the decree which defendants bring up for review by their petition for certiorari.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals erred in holding:

I. That the contention of petitioners that the only character of credit items to which the respondents were entitled under the contract "were such as were paid by some other railway by virtue of a contract for the use of the property" while a strict construction of the exact wording of the contract is not "a fair construction of the spirit of the agreement."

II. That its conclusion as to what was the "spirit of the agreement" was based upon or warranted by the history of the transaction.

III. That its construction of the contract giving the surplus earnings to the respondents was justified by the reading of the contract in its entirety.

IV. And in its order, judgment and decree directing the District Court of the United States for the Southern District of Iowa to so modify its decree "that the surplus earnings belong to the railways, and to appoint a master under instructions to ascertain the part due each upon a wheelage basis."

POINTS AND AUTHORITIES.

I.

THE CONTRACT OF MAY 10, 1889, WAS CLEAR AND UNAMBIGUOUS, AND ITS INTERPRETATION DOES NOT REQUIRE A CONSIDERATION OF THE ACTS OF THE PARTIES THEREUNDER.

Where the meaning of a contract is clear in the eye of the law, the courts will not resort to the acts of the parties for its construction.

Railroad Co. v. Trimble, 10 Wall. 367.

Russell v. Young, 94 Fed. 45 (C. C. A.).

Ralga v. Atkins, 61 N. E. (Ind.) 726.

Comptograph Co. v. Burroughs Co., 179 Ill. 83, l. e. 108.

A written instrument is ambiguous only when found to be of uncertain meaning by persons of competent skill and information.

Comptograph Co. v. Burroughs Co., *supra*.

II.

THE CONTRACT OF 1889 WAS RATIFIED IN ALL ITS TERMS BY THE CONTRACT OF 1897.

III.

IF RESORT IS HAD TO THE CONDUCT OF THE PARTIES AS A CONSTRUCTION OF THE CONTRACT, IT WILL BE FOUND THAT THE FUND WAS DEALT WITH ALWAYS AS BELONGING TO THE DEFENDANT COMPANY AND DISPOSED OF AS IT DIRECTED UNTIL JUST BEFORE THIS SUIT WAS BROUGHT.

ARGUMENT.

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THE CONTRACT OF MAY 10, 1889, WAS CLEAR AND UNAMBIGUOUS AND ITS INTERPRETATION DOES NOT REQUIRE A CONSIDERATION OF THE ACTS OF THE PARTIES THEREUNDER.

In the conduct of its business as a terminal company, the Des Moines Union Railway Company from time to time moves cars from and to industries located on its lines, for carriers other than complainants, for which it makes and collects a charge. It also leases certain pieces of its property not needed at present, for railway purposes, for which it collects rentals. It also leases certain portions of its union depot, for which it collects rentals. The funds received from these sources are what have been known in this record and in the books of the terminal company as "surplus earnings."

The Des Moines Union Company took possession of the terminal property May 1, 1888, as already shown, and began the operation thereof.

On May 10, 1889, the defendant company entered into a written contract with the predecessors of complainants, by which it granted to them a certain qualified use of the terminal property and agreed to furnish to them certain terminal services (vol. II, p. 479). In section 3 of the contract (p. 481) it was agreed that plaintiffs' predecessors should pay for such terminal services a monthly sum to be ascertained in a particular manner, and then section 4 of the contract provides:

"Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be deducted therefrom the amount, if any, which *other railway companies* may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month, and the remainder shall be paid by the parties of the second part in the proportion that the wheelage of each of said parties bears to the entire wheelage of all said second parties during such preceding month."

The Circuit Court of Appeals said with respect to our position in this argument that "this latter contention is a strict construction of the exact wording of the contract" (Rec., vol. V, p. 2115). There is nothing in any other provision of the contract to qualify or impair the force of "the exact wording of the contract."

Where a contract itself is clear and unambiguous, extraneous facts cannot be resorted to for the purpose of construction. This is the accepted rule.

In the case of

Railroad Co. v. Trimble, 10 Wall 367,

this Court, in discussing the effect to be given to the acts of the parties in construing a contract, l. e. 377, said:

*** * * Where there is doubt as to the proper construction of an instrument, this feature of the case is entitled to great consideration; but where its meaning is clear in the eye of the law, the error of the parties cannot control its effect. In this view of the subject, conceding that Trimble took this conveyance, not out of abundant caution and to solve in his favor a doubt which might otherwise possibly arise against him, but because he deemed

it necessary to give him a title which he did not already possess, his legal rights in this controversy are just what they would have been if that instrument had not been executed."

The case of

Russell v. Young, 94 Fed. 45 (C. C. A.),

involved the construction of a contract between an attorney and his client with respect to compensation for legal services. One of the claims made by the plaintiff in the case was that the contract had been construed by the act of the parties. The opinion was written by Circuit Judge Lurton, and referring to the question under consideration, he says (p. 47):

"Plaintiff offered to prove that he had deducted 7½% of every cash collection made by him and remitted the remainder to Mr. Carlisle with a statement showing that he had retained 7½% as compensation for the collection of the particular remittance, and that no exception had ever been taken by Mr. Carlisle to this construction of the contract. This evidence was offered for the purpose of showing that the parties had construed the contract according to the present contention of plaintiff in error. The evidence was rejected upon the ground that the contract was not doubtful and needed no such sidelight in its interpretation. Evidence as to the particular construction by the parties of a doubtful or ambiguous instrument is often of great importance, but such evidence can never control the effect unless the legal meaning is doubtful. *Railroad Co. vs. Trimble*, 10 Wall 367,377; *Lang Co. vs. Doll*, 35 Md. 89; *Fogg vs. Insurance Co.*, 10 Cush. 337. To give effect to a written agreement according to an erroneous construction placed upon it by the parties would not be to con-

strue, interpret and enforce the written agreement upon which the action is brought, but to enforce a new and different contract."

The case of

Ralya v. Atkins, 61 N. E. (Ind.) 726,

was a suit upon a contract which, it was claimed, had been construed by the acts of the parties. Referring to this subject the court says (p. 728) :

" * * * This action is founded on the contract in writing, executed by the parties, and it is sought to enforce the same as executed, not modified by any oral agreement or otherwise. It is true that when the terms of a contract are of doubtful or ambiguous meaning, the construction placed on the same by the parties by their conduct and acts may be shown for the purpose of arriving at their true intention. The construction placed on such contract by the parties is entitled to great weight and may be controlling. * * * When, however, the contract is free from ambiguity and its meaning is clear, such rule is not applicable. * * * In *Morris vs. Thomas*, 57 Ind. 322, this court said: 'If there is any obscurity, uncertainty or ambiguity in the terms of a contract, then the acts of the parties in connection therewith, as suggested by appellant's counsel, would furnish valuable aid in the construction of the contract; but where, as in this case, the terms of the contract are plain, intelligible and free from doubt and uncertainty, rules of construction are unnecessary and of no possible service. In such a case it is certainly not the province of the courts by any rules of construction to make another and entirely different contract for the parties from the one they made for themselves.'"

In the recent case of

Comptograph Co. v. Burroughs Co., 179 Ia., l. c. 108,

the Supreme Court of Iowa had to say upon this subject the following (p. 473) :

"we understand the law to be that where the parties to an agreement have acted upon a certain interpretation of it, this interpretation will not be followed by the courts where the contract is not ambiguous, since a construction contrary to the plain meaning of the instrument is necessarily erroneous, and the parties are not bound by their erroneous construction of it. *Spencer v. Millisack*, 52 Iowa, 31, 2 N. W. 606; also *Railroad Company v. Trimble*, 10 Wall. (77 U. S.) 367, 19 L. Ed. 948. But where there is doubt as to the proper construction of an instrument, the construction put upon it by the parties is entitled to consideration. *Railroad Company v. Trimble*, supra."

A written instrument is ambiguous only when found to be of uncertain meaning by persons of competent skill and information. 1 Greenleaf on Ev. (Lewis Ed.) § 298."

Turning now to an examination of the contract of May 10, 1889, for the purpose of determining whether or not it is ambiguous with respect to the subject matter of this inquiry. Two things must be kept in mind, because, in the language of the Supreme Court of Iowa, "a written instrument is ambiguous only when found to be of uncertain meaning by persons of competent skill and information." (*Comptograph Co. v. Burroughs*, supra.)

One of these facts is that the charter of the Des Moines Union Railway Company contained, among other things, the following (vol. II, p. 420) :

“The general nature of the business to be transacted shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, Iowa, including * * * the transfer of cars from the line or depot of one railway to another, or from the various manufactures, warehouses, store-houses or elevators to each other or to any of the railways or depots thereof, now constructed or to be hereafter constructed, in or around said City of Des Moines.”

When the Des Moines Union Railway Company accepted this charter it not only acquired the powers, but assumed the obligations of a common carrier, and included in this was the power and obligation to perform switching services not only for complainants and their predecessors, but for any other railroad or shipper who desired transportation over its line. In other words, the duties and obligations of the Des Moines Union Railway Company were not confined to serving the railways parties to the contract of May 10, 1889, but it owed the duty of performing the services of a common carrier for any other railway company with which it might connect, or any shipper who desired to use its line for transportation. For these services the Des Moines Union Railway Company was entitled to compensation. Not only this, but it had long been the custom of railway companies to lease privileges in their depots, to charge storage for baggage, etc. It was therefore certain that from these sources the defendant company would receive an income, whether great or small.

The other fact is that this contract of May 10, 1889, was drawn by Col. Wells H. Blodgett, then general solicitor for The Wabash Company, who, as the record shows, had been exclusively employed in the railroad service for years prior to the drawing of this contract and therefore knew the sources of revenue upon which the defendant company might depend.

Knowing by whom this contract was drawn, we would naturally expect to find it clear and unambiguous and its provisions stated in no uncertain terms, and in this expectation we are not disappointed. The language selected by Colonel Blodgett to evidence the agreement is as follows (vol. II, p. 481):

“Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be deducted therefrom the amount, if any, which *other railway companies* may be under obligations to pay by virtue of *contracts* for the *use* of said property, or parts thereof, for the preceding month.”

Now there are three things which must appear before the complainants are entitled to have a credit upon their accounts, and these three things are the following:

- (a) The sums must be paid by other railway companies.
- (b) They must be paid by virtue of a contract.
- (c) They must be paid for the use of the property.

The idea that the complainants are entitled to credit for any items which do not come within the above clas-

sification is excluded by the very language of the contract following that above quoted, which is as follows:

"and the *remainder* shall be paid by the parties of the second part."

The word "remainder" means the aggregate of the sums ascertained as provided in section 3 of the contract, after deducting the items specifically authorized in section 4.

It is undisputed that almost from the beginning the terminal company did receive payments from other railway companies by virtue of the contracts for the use of this property, and that these sums have been consistently credited upon the bills of the complainants and their predecessors.

For instance, the record shows that the Chicago Great Western Railway Company has for many years paid large sums annually for the use of the terminal property, and that likewise other railroad companies are paying such items, but all these sums, as we have said, have been credited to the complainants and their predecessors.

Upon this subject Mr. E. B. Pryor, a witness for the complainants, and vice president of The Wabash Company, and who had examined the books of the terminal company for the purpose of qualifying himself as a witness, testified in substance:

The Wabash, and the Chicago, Milwaukee & St. Paul Railroad Company, are the only present users of the terminals who are successors to the original parties of the second part to the contract of May 10, 1889. The other railroads which are now using the terminals, or parts of them, are the Chicago, Great Western, the

Chicago, Burlington & Quincy, the Minneapolis & St. Louis Railroad Company, and the St. Paul & Des Moines Railroad Company. The amounts which these companies are under obligation to pay by virtue of their contracts for the use of the property for the preceding month, using the language of the contract, 'are deducted from the bills rendered to your Company and the Chicago, Milwaukee & St. Paul Railway Company.' Among these amounts the Chicago Great Western Railroad Company, and its predecessor, the Chicago Great Western Railway Company, has been paying one-third of all the taxes as a part of the rent, which it pays, and an amount equal to one-third of the maintenance and other amounts which are specifically set out in the contract. (Vol. II, p. 353.)

We have, therefore, the situation that it was perfectly apparent that the terminal company would have earnings of the character which make up the fund in controversy, and we have a contract drawn which specifically confines the credits to which the complainants are entitled, to items other than those under consideration, and the contract excludes the items under consideration by specifically providing that the remainder should be paid by the tenant companies. Language more appropriate to carry out what was in the mind of the parties could scarcely be selected.

Even if we resort to the conduct of the parties as an aid to construction, the result is the same.

As we understand counsel for petitioners they do not really contend that the contract is ambiguous, but ignoring the rule of law which we have cited they contend that the conduct of the parties under the contract put a construction upon it which gives to them these surplus earnings.

What was that conduct? We concede that at the beginning the Des Moines Union credited these earnings, then very small, to the railway companies. Why it did this the record does not show. There is no testimony indicating that there was any discussion of the subject. These earnings belonged to the Des Moines Union and it could do with them what it pleased. The ultimate beneficiaries of these revenues at that time were very much the same whether they went to the Des Moines Union or to the tenant companies.

The first record action taken with respect to them was the resolution of the Des Moines Union of February 11th, 1891 (Rec., Vol. II, p. 497), as follows:

"It is ordered that the rents collected for the use of the Company's real estate and the switching charges paid in be credited on bills of *the different tenant companies occupying this company's terminals*, giving to each company its share ascertained by wheelage."

Now this had been done for a few months previously. This resolution was the action of the Des Moines Union, disposing in the way indicated of its own revenues. The credit, it is to be observed, was to be allowed to all the tenant companies, including the Chicago, St. Paul & Kansas City Company, which was neither a shareholder in the Des Moines Union nor a party to the contract of 1889. If by that contract these revenues belonged to the petitioners' predecessors, the Des Moines Union had no right to give them in part to the C., St. P. & K. C. Company, for it was not a party to the contract. What that Company paid under its own contract with the Des Moines Union was under the contract of 1889 to be deducted from the expense.

charges against the other railway companies, and it was entitled to nothing on the score of receipts by the Des Moines Union on switching and rental accounts. But the Des Moines Union had the right to make concessions from its own revenues to any or all of its tenant companies. That the C., St. P. & K. C. Company shared in the credits to the tenant companies, so long as they were allowed is shown by Rec., Vol. II, p. 279 to 313.

This concession for whatever reason made ceased January 7th, 1892, less than three years after the contract of May, 1889, when the directors of the Des Moines Union passed the following resolution (Rec., Vol. II, p. 499) :

"Whereas, this Company is in need of a cash capital with which to purchase supplies and pay current bills, which come in before it receives its monthly revenue from the tenant companies:

Therefore, be it resolved that until the further action of the Board, the sums received as rents of real estate and all switching charges shall not be credited upon the accounts of the tenant companies, but shall be used for the aforesaid purposes."

In other words, the Des Moines Union wanted a working capital fund and got it by its own action in withdrawing from the tenant companies, all of them, what before it had allowed them.

And this new order was to continue until further action of the Des Moines Union. Strange that the disposition of these revenues whatever that might be, should from the beginning be determined by the sole action of the Des Moines Union if it was not the owner of them.

No action was ever had respecting these revenues by any other company until many years after, in 1906, when this suit was in the brew.

And after January, 1892, these revenues were never again credited to any of the tenant companies, but they were used entirely in the acquisition of additional property, in improvements and in the accumulation of surplus.

The first reference to surplus earnings in the record after the passage of the resolution of January 1, 1892, is contained in the record of a meeting of the board of directors of the terminal company held May 26, 1894, (ex. 130, vol. IV, p. 1338), where it was resolved to pay what is known as the Hill mortgage of \$4,000 out of this fund. At this meeting the only Wabash representative present was its local attorney, Mr. A. B. Cummins.

At the meeting of the board of directors held June 7, 1894, at which Charles M. Hays, general manager of the Wabash Company, was present, the following appears in the record:

"The records of the meeting held May 26th, 1894, were read and the proceedings therein set forth were, on motion, unanimously approved and agreed to with the exception of the Resolution to pay the mortgage upon lot seven (7) in block fifteen (15) of the Original Town of Fort Des Moines amounting to \$4,000.00, out of the funds on hand realized from rents of real estate and from switching cars. On motion to approve this part of the record, Mr. Hays wanted further time." (Ex. 132, vol. IV, p. 1340.)

At a meeting of the board, held July 10, 1894, the following appears of record (ex. 133, vol. IV, p. 1341):

"On motion of F. M. Hubbell, the treasurer was directed to pay the Abbie Bechtel mortgage of two thousand dollars (\$2,000) with accrued interest thereon, upon the south forty-four (44) feet of lot ten (10) in block thirty-five (35) Fort Des Moines, Iowa, upon which is situated in part, the Freight House of this Company; and upon payment of same to have the mortgage cancelled of record, provided, however, that the written consent of Chas. M. Hays could be procured."

On June 19, 1894, Mr. Hays wrote Mr. Hubbell as follows (see cross examination of Hays, vol. II, p. 256):

"Referring to the M. L. P. Hill note of \$4,000 which you reported at a meeting of directors of the Des Moines Union Railway Company, held June 7th, as having been paid by you, which you suggested should be taken out of the surplus earnings of the Des Moines Union Railway, and upon which I withheld my vote until I could consult with President Ashley, of the Purchasing Committee, *after discussion of the matter with Mr. Ashley and General Solicitor Blodgett, they concur in the opinion that a proper disposition of the payment will be to charge it to the surplus earnings as proposed,* and you may therefore be governed accordingly. Please ascertain from treasurer and advise me what balance this still leaves in the hands of the treasurer to the credit of 'surplus earnings.' "

And again on August 9, 1894, Mr. Hays wrote Mr. Hubbell (see vol. II, p. 256) as follows:

"I have yours of the 7th showing surplus earnings of Des Moines Union Railway on hand July 1st of \$15,312.89, and after paying note of L. P. Hill of \$4,000 interest, \$180, \$11,132.89 on hand, I approve of your application of \$2,000 of this amount to the payment of the Abbie-Bechtel mortgage."

Defendants' exhibits 312 to 316 inclusive (vol. fV, pp. 1623-7), are letters passing between Mr. Hubbell and Mr. Hays in October and November, 1894, in reference to the application of surplus earnings to the payment of the indebtedness on the Heath property, which application Mr. Hays approved.

In pursuance of this correspondence the board of directors of the terminal company, at a meeting held November 14, 1894 (ex. 135, vol. IV, p. 1343), at which Mr. Hays was present by proxy to A. B. Cummins, a resolution was passed appropriating out of the surplus earnings \$10,775.00 to apply upon said indebtedness and to pay the balance of said indebtedness, amounting to \$40,000.00, and evidenced by unmatured notes out of the surplus earnings as the notes became due, and the following was also enacted:

"The words 'Surplus Earnings' as herein used, mean that fund arising from the rentals of such real estate and from switching charges."

On November 19, 1894, the same subject was considered by a meeting of the board of directors of the terminal company (ex. 136, vol. IV, p. 1344).

At the annual meeting of the stockholders held February 14, 1895 (ex. 138, vol. IV, p. 1347), there were present, among others, C. M. Hays, general manager of the Wabash Railroad, Mr. H. L. Magee, a representative of the Wabash, the Purchasing Committee of the Wabash by Charles M. Hays, proxy, and the Des Moines Northern & Western Railroad Company by F. M. Hubbell, president. The following appears in the record:

"On motion, the minutes and proceedings of all meetings of the Board of Directors and Stockholders held during the year 1894, were read and approved and all of the acts of the Board of Directors and Officers done during year 1894, were confirmed and ratified."

In August, 1896, Mr. J. Ramsey, Jr., then vice president and general manager of The Wabash Railroad Company, wrote to F. C. Hubbell, president of the Des Moines Union Railway Company (ex. 357, vol. IV, p. 1666), as follows:

"This will be handed you by Mr. Pryor, our assistant auditor, whom I have requested, in company with Mr. Garrett to go to Des Moines, and look over the methods and cost of operating the joint terminals.

I do not do this because I have any doubt or apprehensions as to the property being handled in the best way possible for the interests of all, but only in order to fully post myself on the whole situation at that point.

I find our company has not been in the habit of receiving any statement from the Des Moines Union, other than the one showing the cost of operation, and we have no information, whatever, as to the revenues of the company, their general dis-

position, etc., nor any of the detailed information which I think we should have in order to keep properly informed.

Will you kindly have the officers of the Des Moines Union furnish Messrs. Pryor and Garrett every opportunity necessary for them to become properly posted in the premises."

From this it appears that at this time the new vice-president and general manager of the Wabash learned all the facts as to the way in which the business of the Terminal Company was conducted, what its revenues were and how its accounts were kept.

II.

THE RATIFICATION CONTRACT OF 1897.

Of greatest significance here is the history of the proceedings which ended in the contract of July 31st, 1897.

The original railway companies parties to the contract of 1889 were no longer operating their respective properties and question seems to have arisen as to whether the contract was binding upon their successors. This doubt affected the market value of the Des Moines Union bonds, which in large part were held by the Wabash Company. Mr. Ashley, President of the Wabash, wanted that doubt removed. On December 28th, 1896, he wrote to Mr. Hubbell as Secretary of the Des Moines Union as follows (Rec., vol. IV, p. 1673):

"Permit me to remind you of our understanding to the effect that you would have prepared at once a new agreement for the tenant ~~concession~~ of the Des Moines Union Railway Co. to sign, this new agreement being considered necessary on ac-

count of the foreclosure of the Des Moines & Northwestern. I understand that the agreement will be exactly as before, except that the time must be made to correspond with the life of the bonds, or to be made for a period to extend beyond their maturity.

I write now for the purpose of urging the immediate preparation of this agreement, as without it we cannot well dispose of our bonds. When it is ready please forward it to Colonel Blodgett, asking him to examine the same and to send it to me as soon as possible. I should not suppose it would take long to have the agreement prepared and as time in this case is of importance I hope you will see that the paper is gotten under way at once. Perhaps you have already taken the matter in hand and if so, so much the better."

On February 3, 1897, Mr. Hubbell wrote to Colonel Blodgett (ex. 367, vol. IV, p. 1679), enclosing the proposed new contract prepared by Mr. Cummins. This proposed contract is defendants' exhibit 383 (vol. IV, p. 1703).

It is significant to note that so far as the passages in the proposed contract under which the subject of surplus earnings arises are concerned, the proposed contract which Mr. Cummins prepared and which was forwarded to Colonel Blodgett was identical with the contract of May 10, 1889, the provision being contained in section 3 as follows:

"Having so ascertained the monthly aggregate of all the items and ~~things~~ mentioned in the preceding section, which shall embrace every item of expense or liability of whatsoever name or character, there shall be deducted therefrom the amount, if any, which other railway companies may be under obligations to pay by virtue of con-

tracts for the use of said property or parts thereof, for the preceding month, and the *remainder* shall be paid by the Des Moines & St. Louis Company," etc.

Immediately upon this proposed contract coming into the hands of Colonel Blodgett, the question of what was to be done with the surplus earnings was raised. The form of the question, however, was not as to who was entitled to the surplus earnings under the contract of May 10, 1889, but what change could be made in the contract so as to entitle the tenant companies to such surplus earnings, or a portion thereof. It seemed to be conceded that under the contract of May 10, 1889, the surplus earnings belonged to the terminal company, and it was Colonel Blodgett's idea that this feature of the contract should be changed.

In a letter of Colonel Blodgett to Mr. Hubbell dated March 26, 1897 (ex. 377, vol. IV, p. 1687), Colonel Blodgett encloses two forms of section 3 which he proposes to be inserted in place of section 3 as prepared by Mr. Cummins. These forms are exhibits 378 and 379 (vol. IV, pp. 1688-91), and provide for crediting the surplus earnings upon the accounts of the tenant companies. If these tenant companies were entitled to credit for these surplus earnings under the provisions of section 3 of the contract as prepared by Mr. Cummins, which we have shown are the same provisions as are contained in the contract of 1889, then, of course, it was unnecessary for Colonel Blodgett to insist upon any change in this section. The clear inference is that in the opinion of the parties neither the proposed contract as drawn by Mr. Cummins, nor the contract of 1889, entitled the tenant companies to these credits.

The subject of the surplus earnings was threshed out by the parties, as will be ascertained by the following exhibits (vol. IV): 367-a, 368 (p. 1680), 375-6 (pp. 1684-7), 382 (p. 1694), 377 (p. 1687), 378 (p. 1688), 379 (p. 1689), 380 (p. 1691), 381 (p. 1692), 384 (p. 1712), and 385 (p. 1723).

It will be noted from an examination of these exhibits, that nowhere do the Wabash officials take the position that they were entitled to a credit for these surplus earnings, either under the contract of 1889, or because of any alleged construction put thereon by the acts of the parties, but their contention is that in this new contract a change shall be made with respect to the surplus earnings, which would give to the tenant companies such earnings, or a portion thereof.

The result of the conferences and negotiations was what is known as the ratification contract of July 31, 1897 (vol. 11, p. 506), which was a ratification and adoption of the contract of May 10, 1889, except as therein changed, and no change was made in the language of the latter contract under which the question of surplus earnings arises.

This ratification contract was executed by the Des Moines Union Railway Company on the one hand, and by the complainant, The Wabash Railroad Company, and by the Des Moines Northern & Western Railroad Company (predecessor of the Chicago, Milwaukee & St. Paul Railway Company) on the other.

This contract, referring to the contract of May 10, 1889, provides among other things as follows:

“And the Wabash Company for itself agrees to make the *payments therein provided for at the times and in the manner prescribed for the said*

Des Moines & St. Louis Railroad Company so long as it operates the railroad of the said Des Moines & St. Louis Company."

The Complainant, the Wabash Company, agreed therefore, to make payments to the Des Moines Company, not according to any modification of the contract of May 10, 1889, or any subsequent construction thereof, but strictly, as "*therein provided.*" It was provided in the contract of May 10, 1889, that the Des Moines & St. Louis Company would pay its share of all the expenses of the Des Moines Company ascertained on a wheelage basis, except there should

"be deducted therefrom the amount, if any, *which other railway companies* may be under obligation to pay by virtue of *contracts* for the *use* of said property or parts thereof, for the preceding month."

It therefore appears that the attempt to change the contract with respect to the disposition of the surplus earnings was abandoned, and it was agreed that the Wabash Company should pay in accordance with the terms of the original contract.

With respect to the predecessor of the Chicago, Milwaukee & St. Paul Railway Company, the contract provided (p. 508) :

"And the said Des Moines, Northern & Western Company for itself agrees to assume all the obligations of a lessee railroad company as prescribed in the said contract for the entire term named therein, and as though it had been named in and was a party to the said contract when originally made, and to pay to the said Des Moines

Company at the times and in the manner therein prescribed the sums of money which may become due, computed according to the terms and provisions of the said contract with respect to a tenant company."

Here is the Des Moines, Northern and Western bound like the Wabash to pay at the times and in the manner prescribed by the contract of 1889 the sums of money which might become due, computed according to the terms and provisions of that contract.

What Mr. Ashley wanted in the new contract was placed there. The obligation imposed upon the tenant companies by the contract of 1889 were expressly assumed by their successors.

III.

SUBSEQUENT CONDUCT OF THE PARTIES.

The primary purpose of this contract of July, 1897, was, as we have said, to help the salability of the bonds of the Des Moines Union Company on the general market. The Wabash Company held the largest block of these bonds and evidently wished to dispose of them. So far as concerned the Des Moines Union Company and the tenant railway companies and their relations *inter se* the contract of 1889 needed no amendment because there was the tacit agreement between all of them that the railway companies had succeeded to the rights of their predecessors in this contract. But a prospective purchaser of bonds would desire something more than this and that would be a binding obligation upon the railway companies to perform the terms of the contract and to make the payments therein prescribed, and so the contract of 1897 was made and this purpose of improving the credit of the bonds was

accomplished. But there was another thing that might be done to help to this same end of making bonds salable and that was to list them upon the New York Stock Exchange, where merchants in such wares most do congregate, and Mr. Hubbell, on behalf of the Des Moines Union with the approvel and aid of Mr. Ashley as President of the Wabash Company, made application in due form to the Stock Exchange for the listing of these bonds. The rules of the Exchange seemed to require that the resourees available for payment of the bonds, principal and interest, shall be disclosed, so that dealers in them, buyers and sellers, may be able to form some opinion as to their intrinsic value.

The Record, Vol. 4, pages 1734 and following, contain a full history of this listing of the bonds. The Stock Exchange required a "complete financial statement of said corporation for a period covering at least one year before its reorganization: i. e., a detailed statement of its earnings and receipts from every source, a detailed account of all expenditures and the amount of its outstanding indebtedness in detail of every description and a balance sheet of its books, etc., etc." (p. 1736).

Responding to this requirement, the Des Moines Union Railway Company on September 28, 1897, in its application to the Committee on Stock List of the New York Stock Exchange, set forth its ownership of the terminal properties and the various functions which it performed and then said (p. 1744):

"The terminal facilities offered by this Company are at present shared by the Des Moines & St. Louis R. R. (owned by the Wabash R. R. Co.), the Chicago Great Western Railway, and the Des Moines, Northern & Western Railroad. Each of

these companies for itself has agreed to pay monthly, as rental for the facilities used, a sum equal to one month's interest on the outstanding bonds, besides they pay for their proportion of the expense of operation. *In addition, the Company derives considerable revenue for switching cars for other railroads (not tenants) and in rents for the use of various portions of the property."*

In this same application it made a statement of receipts and expenditures for the year ending July 30, 1897, as follows:

“RECEIPTS AND EXPENDITURES
For the year ending June 30, 1897.

RECEIPTS.

Amount Rec'd from The Wabash R. R. Co. on wheelage basis.....	\$31,251.14
Amount Rec'd from Des Moines N. & W. Ry. Co. on wheelage basis.....	58,447.66
Amount Rec'd from Chicago G. W. Ry. Co. on a wheelage basis.....	47,190.71
Amount Rec'd for outside switching and rent of real estate.....	10,282.42
	<hr/>
	\$147,172.00

EXPENDITURES.

Interest paid on First Mtge. Bonds.....	\$28,450.00
Taxes for year ending June 30th, 1897	6,260.25
Conducting Transportation	66,147.27
Maintenance of Way Structures.....	15,935.55
Maintenance of Equipment.....	13,679.33
General Expenses	6,390.11
	<hr/>
	\$136,889.51
Surplus	\$10,282.49"

This application was forwarded by Mr. F. M. Hubbell as Secretary of the Des Moines Union Railway Company to Mr. Ashley as President of the Wabash Company and by Mr. Ashley was presented to the proper Committee of the Stock Exchange and by that Committee it was approved and bonds were listed as desired.

Here is a statement made for the use of the investing public and we have here the direct statement in the text of the application that in addition to the sums which the Railway Companies have agreed to pay monthly "the Company (the Des Moines Union) derives considerable revenue for switching cars for other railroads not tenants and in rents for the use of various portions of the property." And in the statement of receipts and expenditures for the preceding year we have set forth in detail what the Des Moines Union received from each of the tenant companies and the additional item of revenue "for outside switching and rent of real estate, \$10,282.42." Deducting the various charges to which the revenues of the Des Moines Union were subject there was left the surplus of \$10,282.49, the amount received for outside switching and rent of real estate. This puts the matter absolutely beyond controversy. These surplus earnings belong to the Company which owned the property from which they were derived and they were morally pledged to every purchaser of one of these bonds as resources out of which the bonds, interest and principal, might be paid.

The contract of 1897 ratified the terms of the contract of 1889 in every respect. It made two changes of any kind and only two. The first was a change in the parties. It substituted living and active parties for

those who had become defunct or moribund. And it set out in full and in detail the shareholding in the Des Moines Union Railway Company. This second change showed the ownership of the stock to the extent of 2,500 shares, a majority of all, in private hands, owned by F. M. Hubbell and Son. The contract in its entirety was one of value to the Des Moines Union as such, and to its shareholders ratably, for it recognized in the property of the Des Moines Union the ordinary and usual incidents of property, that is the right of the owner to the rents, issues and profits thereof. The contract was one of value during its term, to the Des Moines Union because it reserved to that company the earnings that it derived from switching done by it for outside parties and the rentals received from property not in railroad use. And so it was of value to the shareholders, and equally so, whether these earnings were distributed as dividends or reinvested in the property. And this contract was made, ratifying that of 1889 according to its very terms, with the Hubbells asserting their ownership, which indeed was undisputed, of the 2,500 shares of the capital stock of the Terminal Company, and asserting, what was agreed to, the ordinary and usual rights incident to such ownership. Nothing here was furtively done, but everything desired upon the one side or the other was openly proclaimed. Nor was anything done in haste. Beginning the matter in December, 1896, it was not concluded until July 31st, 1897. Here was a case where counsel was perhaps little needed, for the representatives of the parties interested were men capable and experienced in such affairs. But counsel attended at every stage. And when it was concluded so far as adjustment between the parties was concerned on July 31st, 1897, they pro-

ceeded to deal with the public, consistently with the arrangement between themselves, in their listing of the securities upon the Stock Exchange of New York. And between them lives they did the same.

The execution of this contract was ratified by the directors of the Des Moines Northern & Western Railroad Company on September 7, 1897 (ex. 218, vol. IV, p. 1497), and by the directors of the Wabash Company October 5, 1897 (ex. 237, vol. IV, p. 1540).

At no time, either before or after the execution of the ratification contract, did The Wabash Company make any claim to these surplus earnings until just prior to the commencement of this suit, and as a step preliminary thereto.

Turning now to the attitude of the Chicago, Milwaukee & St. Paul Railway Company with respect to these surplus earnings, it will be noted that its predecessors never at any time made any claim to them. The first interest, either direct or indirect, which the Milwaukee Company acquired in the property of its predecessors was by virtue of a contract with F. M. Hubbell & Son, made in 1894, and which was negotiated between Mr. Roswell Miller, president of and representing the Chicago, Milwaukee & St. Paul Railway Company, and Mr. F. M. Hubbell, representing F. M. Hubbell & Son and the Des Moines Northern & Western Railroad Company. During the negotiations leading up to this contract, Mr. Miller was advised by Mr. Hubbell that the only interest which the Des Moines Northern & Western Railway Company had in the terminal property was the interest represented by its 1,000 shares of stock, and that 2,500 shares of stock in the terminal company was owned by the defendant, F. M. Hubbell & Son.

The Milwaukee Company in 1899, having acquired all the outstanding stock and bonds in the Des Moines Northern & Western Railway Company, took the title to the property of the latter company and consolidated such property with its own, and thereafter the Milwaukee Company had such interest in the terminal company as it acquired from the Des Moines Northern & Western Company.

On November 22, 1898, Roswell Miller, president of the Milwaukee Company, wrote Mr. Hubbell (ex. 411, vol. IV, p. 1758), in reference to the terminal contract, evidencing the fact that he had examined and understood the contents thereof.

On January 16, 1899, Mr. Myers, who was then secretary of the Des Moines Northern & Western Railroad Company, and also secretary of the Milwaukee Company, wrote asking for additional copies of this contract.

On March 7, 1904, one H. G. Hangan, who seems to have been a new comptroller of the Milwaukee, writes to Mr. J. A. Wagner, defendant's superintendent, the following (ex. 504, vol. IV, p. 1843):

"I understand that at the Des Moines Union station there are a number of offices rented, also news stand, lunch room and other privileges which are not accounted for in your monthly statements and bills. I believe you are also collecting rents on certain property on which we have to pay our proportion of taxes.

I do not remember having seen any statement or account of rents collected by your company.

It seems to me that these rents, etc., should be applied towards paying part of the operating expenses similar to the manner in which the business is conducted at the Union Depots at Chicago, Omaha, St. Paul and Kansas City."

On March 22, 1904, Mr. Wagner replies to Mr. Haugan as follows (ex. 505, vol. IV, p. 1843) :

"Relying to your letter of March 7th, our auditor sends your Mr. Winne each month a statement of all rentals of the character to which you refer. These rentals have nothing whatever to do with the proportion of the expense to be paid by your company. Our monthly bills against you for such expenses are made out in strict accord with our terminal contract. We have frequently in the past few years, explained the matter to the various officials of your company in response to their inquiry."

Of course the letter of Mr. Haugan to Mr. Wagner above quoted cannot be considered as a protest on the part of the Milwaukee to the terminal company's retaining these earnings, nor a claim that the tenant companies were entitled to them under any contract. His thought that they should be credited with these earnings is based, not upon the contract, but upon the fact that the Milwaukee had some different sort of an arrangement with respect to terminal property at other places. This correspondence, however, shows two things:

First. That the Milwaukee Company knew of these earnings, because the terminal company was furnishing to the auditor of the Milwaukee Company a statement of them each month; and

Second. That the Milwaukee Company knew they were not being credited with these earnings, and the reason therefor was that the Des Moines Union Company was claiming the right to them under the contract.

Further, it appears that the question of the surplus earnings was threshed out between the Des Moines Union Company and the Milwaukee Company some four or five years prior to the correspondence above quoted.

On December 2, 1898, Mr. Roswell ^{Miller}, president of the Milwaukee Company, wrote to Mr. Hubbell the following letter (ex. 418, vol. IV, p. 1765):

"I observe that the contract between the Des Moines Union Railway Company and the Des Moines, Northern & Western Railroad Company is only for 20 years. I think it should be for 50 years. Have you any objections to extending it for so long?"

This was during the negotiations between the Milwaukee and Mr. Hubbell, the result of which was that the Milwaukee acquired all the stock and bonds of the Des Moines Northern & Western Railroad Company preparatory to consolidating the property of the latter company with that of the Milwaukee, and shows that the president of the Milwaukee was familiar with the contract of May 10, 1889, and the ratification contract of July 31, 1897. An examination of defendants' exhibits 420 (vol. IV, p. 1766), 321 (p. 1767), 425, p. 170), 430 (p. 1772), 456 and 457 (p. 1802), 458 and 459 (p. 1803), and 460 (p. 1804) will demonstrate, as we have said, that this whole question of surplus earnings was threshed out in an attempt on the part of the officers of the Chicago, Milwaukee & St. Paul Railway Company to have the contract of May 10, 1889, extended for a period of thirty years. In these negotiations the complainant, the Milwaukee Company, became

thoroughly familiar with the situation with respect to these surplus earnings; with the contract of May 10, 1899, and July 31, 1897, and with the attitude of the respective parties with relation to surplus earnings. These negotiations were abandoned in the latter part of 1899 by reason of the parties being unable to agree upon the terms of the proposed extension. No claim was made in any of these negotiations that the complainants or their predecessors were entitled to these surplus earnings under the existing contracts, but the attitude of the defendant company with respect thereto was acquiesced in.

At a meeting of the stockholders of the Des Moines Union Railway Company held January 4, 1900, at which there were present, among others, C. A. Goodnow and A. J. Earling, officers of the Chicago, Milwaukee & St. Paul Railway Company, each holding one share of stock, and the Chicago, Milwaukee & St. Paul Railway Company by A. J. Earling, president, holding 998 shares of stock, and the Continental Trust Company of New York by F. M. Hubbell, proxy, holding 498 shares of stock (ex. 156, vol. IV, p. 1370), there was presented the report of J. A. Wagner, superintendent, showing the use of the surplus earnings by the Des Moines Union Railway Company in acquiring additional real estate and improvements, and this report was approved upon motion of Mr. Earling.

Again, at a meeting of the stockholders of the Des Moines Union Railway Company held January 5, 1906, at which were present the Chicago, Milwaukee & St. Paul Railway Company holding 998 shares of stock, and E. W. McKenna and W. J. Underwood, officers of the Chicago, Milwaukee & St. Paul Railway Company, each holding one share of stock, and F. A. Delano and

E. B. Pryor, officers of The Wabash Railroad Company, each holding one share of stock (ex. 164, vol. IV, p. 1383), there was presented the report of the superintendent of the Des Moines Union Railway Company for the years 1900, 1901, 1902, 1903, 1904 and 1905, which showed the use of the surplus earnings by the Des Moines Union Railway Company for the purpose of acquiring additional property and improvements, and no objection was made to the appropriation of this fund by the defendant company.

It is interesting to note that when objection was made to the use made of the surplus earnings by the Des Moines Union Railway Company, it was not made by one who had aught to do with any of the contracts, articles of incorporation or amendments thereto, or of any of the dealings of any of the companies with any of these, from 1882 down to 1906, and not until "there arose a new king over Egypt, who knew not Joseph." The first demand for the surplus earnings of petitioners was at a meeting of the directors of the Des Moines Union Company on March 12th, 1906, and the names of those noted as present on behalf of the tenant companies are new names. Dodge, Ashley, How, Hays, Blodgett, Ramsey, Priest and Grover are none of them there (Rec., Vol. II, p. 333 *et seq.* Counsel were present, Vrooman for the Milwaukee and Travons for the Wabash Company and made demand for the earnings in identical terms and this may be said to be the inception of the suit. The demand, presented in writing recites that "the repeated requests heretofore made upon you for the distribution and crediting to the tenant companies of the receipts from real estate rentals, switching charges, etc., having been ignored, etc.," an assertion utterly barren of support in fact.

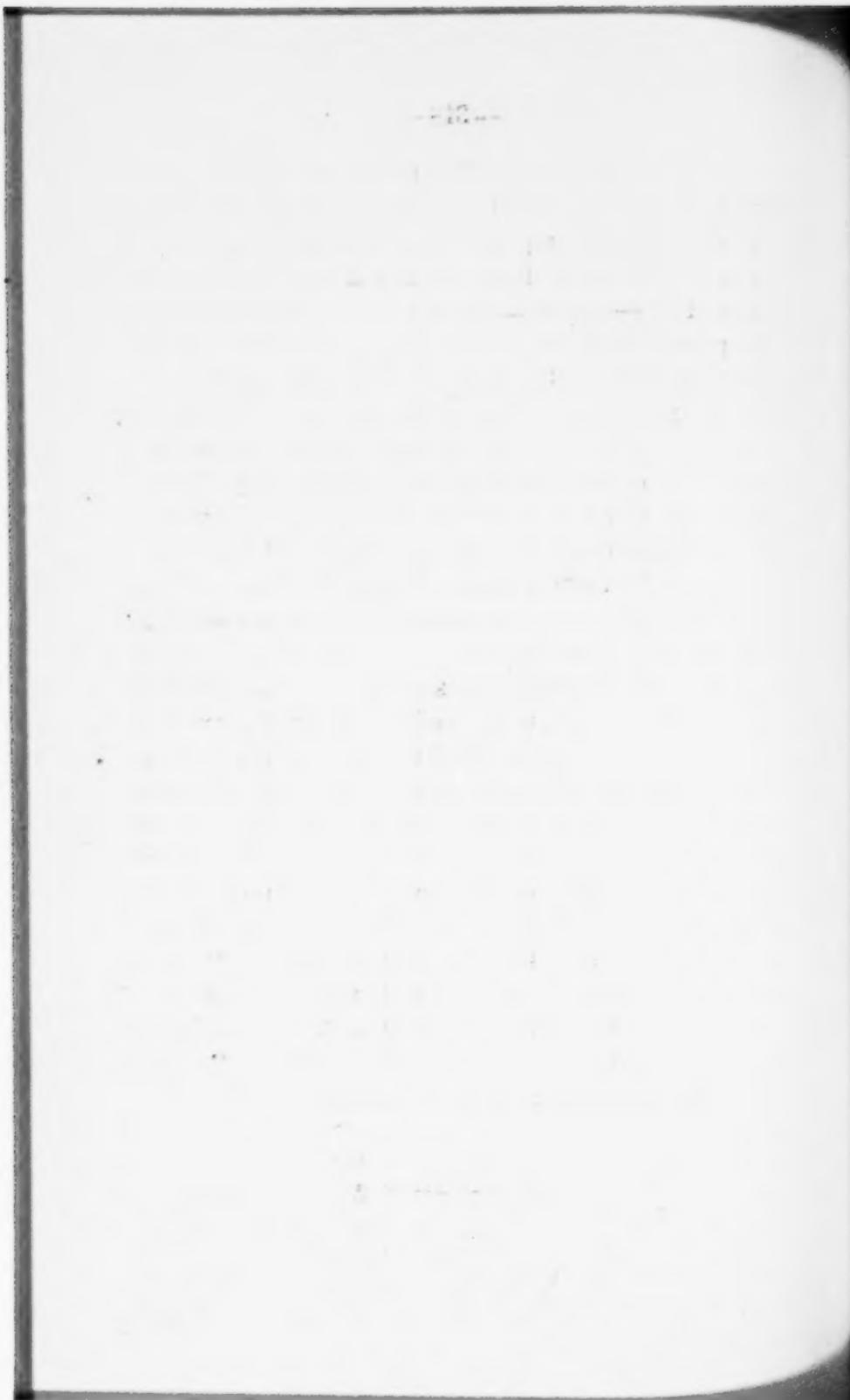
The original bill was filed February 5th, 1907, and the testimony was closed on the last day of 1912. Here was no haste, but ample time for bringing forward any and all existing testimony. And a record was made during this period of nearly six years which extends to five printed volumes and twenty-one hundred printed pages, and we challenge the production from that record of anything savoring of a demand by the tenant companies of these surplus earnings or of an assertion of a right to them by those companies or any of their predecessors prior to March 12th, 1906. Neither in the oral testimony, nor in the correspondence of the officials of the various companies, nor in the records of the directorate or company meetings is evidence of any such demand to be found.

From 1892 to 1906 these surplus earnings were appropriated as of right by the Des Moines Union Company to its own uses, and the other companies concerned acquiesced in and assented thereto. Specific acts of such appropriation have been cited by us, but no protest appears against any of them. More than fourteen years of accord between the conduct of the parties and the literal terms of the contract of 1889 conclusively shows that the interpretation of the contract according to its very terms is the right one.

We respectfully submit that upon both branches of the case the merits are with the defendants to the original suit, and we pray for a decree accordingly.

JAMES L. PARRISH and
FREDERICK W. LEHMANN,

Counsel for the Des Moines
Union Railway Company, F.
M. Hubbell, F. C. Hubbell
and F. M. Hubbell & Son.



**CAPITAL STOCK
DES MOINES UNION RAILWAY COMPANY
TOTAL ISSUED \$400,000
1.8=\$50,000**

818 Des Moines Union Railway Company

6|8 Purchasing Committee

1/4 St. Louis, Des Moines & Northern

1/4 Polk & Hubbell

1/2 Purchasing Committee

1/4 Des Moines & Northern Ry. Co.

1/4 Des Moines & North-
western Ry. Co.

1/8 Purchasing Committee

1/4 F. M. Hubbell

1/8 G. M. Dodge

1/4 Des Moines Northern
& Western R. R. Co.

1/8 Wabash

1/4 Des Moines Northern
& Western Ry. Co.

1/4 Des Moines Northern
& Western R. R. Co.

1/4 F. M. Hubbell & Son

1/4 Chicago, Milwaukee
& St. Paul Ry. Co.

DIAGRAM SHOWING TRANSFER OF STOCK
OF
DES MOINES UNION RAILWAY COMPANY

